

Liberalism, Feminism and Republicanism on Freedom of Speech: The
Cases of Pornography and Racist Hate Speech

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DECLARATION

I, Coromoto Power Febres confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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ABSTRACT

The central issue tackled in this thesis is whether there is room for legitimate restrictions upon pornography and extreme right political organisations' racist hate speech; whether such restrictions can be made without breaching generally accepted liberal rights and within a democratic context.

Both these forms of speech, identified as 'hard cases' in the literature, are presented as problems that political theorists should be concerned with. This concern stems from the increase in these forms of speech but also due to their mainstreaming in society. In this thesis the republican conception of freedom as non-domination is explored as a more suitable account than the liberal one of freedom as non-interference, when dealing with these two forms of speech. In addition, the neo-Roman republican view is aligned with anti-pornography radical feminism. This alignment aids in releasing the feminist position from a liberal framework; thereby reducing the burden of proof relating to harms derived from pornography that this position has been subjected to.

Liberalism's view of freedom of speech as a pre-political right leaves very limited room for restrictions to be made upon speech. The republican view of freedom as non-domination, meanwhile, means that restrictions need not be viewed as a breach of the right of freedom of speech. In addition, liberals argue that the most these forms of speech can cause is offence. By taking republican ideas of equality and respect for the democratic citizen, and anti-pornography radical feminist accounts of performative speech acts and grievances to individuals as part of a group, it is shown that not only can these forms of speech do more than offend, they can, in fact, dominate, in instances of individuals feeling subordinate. The theoretical work is illustrated through looking at two real world cases, Spain, a liberal state, and Finland, a republican state.

TABLE OF CONTENTS

Declaration	1
Abstract	2
Acknowledgements	7
 Introduction	 8
The Extreme Right and Racism	12
Pornography	16
Thesis Structure	22
 Chapter One: Definitions	 25
1.1 Defining the Extreme Right	27
1.2 Defining Pornography	32
Conventional Definitions of Pornography	33
Andrea Dworkin and Catharine MacKinnon’s Definition of Pornography	35
Distinctive Features of the Dworkin-Mackinnon Definition	42
Pornography as Hate Speech	44
1.3 Defining Racist Hate Speech	45
Conventional Definitions of Hate Speech	45
Critical Race Theory Definition of Racist Hate Speech	46
Distinctive Features of the Critical Race Theory Definition of Racist Hate Speech	50
1.4 Similarities: Pornography and Racist Hate Speech	50
1.5 Differences: Pornography and Racist Hate Speech	53
1.6 Defining Alignment	54
Causal Relationships	55
Elective Affinity	57
Alignment	60
1.7 Conclusion	62
 Chapter Two: Liberalism and Freedom of Speech	 64
2.1 Neutrality Rationale	65
Harm Based Approaches	65
Implications for Pornography	68
Implications for Racist Hate Speech	73
Radical Feminist Critique	74

Rights Based Approaches	77
Implications for Pornography	80
Implications for Racist Hate Speech	83
Radical Feminist Critique	84
2.2 Autonomy Rationale	88
Communitarian/Perfectionist Approach	88
Implications for Pornography	90
Implications for Racist Hate Speech	90
Radical Feminist Critique	92
2.3 Conclusion	92
Chapter Three: Republicanism and Freedom of Speech	94
3.1 Republican Freedom	95
Freedom as Non-Domination	96
Freedom as Autonomy	100
Group Domination, Social Domination, Structural Domination	101
3.2 Republican Freedom of Speech	103
Implications for Pornography	106
Implications for Racist Hate Speech	109
3.3 Traditional Feminist Concerns with Republicanism	110
3.4 Challenging Feminist Critiques	113
Challenging Feminist Critiques through the Work of Arendt	116
3.5 Conclusion	120
Chapter Four: The Anti-Pornography Radical Feminist Position	123
4.1 Equality	125
4.2 Pornography	127
4.3 Sex and Race	131
4.4 Racist Hate Speech	133
4.5 Pro-Sex Feminism	135
4.6 Conclusion	138
Chapter Five: A Liberal and a Republican Constitution	140

5.1 A Republican Constitution	141
Underlying Normative Rationale	142
Aim of the Constitution	142
What the Constitution Does	145
Primary Focus of the Constitution	148
Constitutional Formation	149
Concept of Rights Held	150
Basic Rights Constitutionally Protected	151
Form of Government	152
Features of Government	153
Legal System Advocated	156
Other Distinguishing Features	157
Implications for Free Speech Legislation	158
5.2 A Liberal Constitution	159
Underlying Normative Rationale	160
Aim of the Constitution	160
What the Constitution Does	161
Primary Focus of the Constitution	161
Constitutional Formation	162
Concept of Rights Held	163
Basic Rights Constitutionally Protected	164
Form of Government	165
Features of Government	167
Legal System Advocated	168
Other Distinguishing Features	169
Implications for Free Speech Legislation	170
5.3 Conclusion	171
Table 5.1: Blueprint – Liberal and Republican Constitutions	171
Chapter Six: The Finnish and Spanish Constitutions	173
6.1 Finland's Constitution	173
Aim of the Constitution	174
What the Constitution Does	174
Primary Focus of the Constitution	175
Constitutional Formation	176
Concept of Rights Held	176
Basic Rights Constitutionally Protected	178
Form of Government	180
Features of Government	181
Legal System Advocated	183
Other Distinguishing Features	184
Implications for Free Speech Legislation	185
6.2 Spain's Constitution	186
Aim of the Constitution	188

What the Constitution Does	188
Primary Focus of the Constitution	189
Constitutional Formation	189
Concept of Rights Held	190
Basic Rights Constitutionally Protected	190
Form of Government	192
Features of Government	193
Legal System Advocated	194
Other Distinguishing Features	195
Implications for Free Speech Legislation	196
6.3 Conclusion	198
Table 6.1: The Spanish and Finnish Constitutions	198
Chapter Seven: Pornography and the Position of Women in Spain and Finland	200
7.1 Spain	200
The Position of Women	200
How Women are Viewed	206
Impact of Pornography on Views of Women	209
Pornography	211
7.2 Finland	216
The Position of Women	216
How Women are Viewed	220
Impact of Pornography on Views of Women	222
Pornography	223
7.3 Conclusion	227
Chapter Eight: The Extreme Right in Spain and Finland	230
8.1 The Extreme Right in Spain	231
Extreme Right Speech	237
Racist Hate Speech and the Law	240
8.2 The Extreme Right in Finland	244
Extreme Right Speech	252
8.3 Conclusion	256
Conclusion	258
Appendix 1: Interview with Professor K Pekonen	264
Appendix 2: Finnish Ombudsman for Minorities – List of Hate Speech Cases	267
Bibliography	283

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Introduction

This introduction sets out the main issues behind this thesis and describes its rationale. I briefly argue why the extreme right and pornography are matters of growing concern and ought to be addressed by political theorists, leaving the definitions of pornography, racist hate speech and the extreme right to Chapter 1. I shall then offer an outline of the thesis. It is important to note that this thesis is written with a focus on Western societies. Although these forms of speech are obviously present in other societies, it is beyond the scope of this project to consider them.

This thesis looks at freedom of speech; the central research question focuses on whether there is room for legitimate restrictions upon pornography and extreme right political organisations' racist hate speech without breaching generally accepted liberal rights. The liberal conception of freedom, as derived from Mill's *harm principle*, claims that legitimate restrictions may be placed upon an individual's freedom in the instance of the action being curtailed causing harm to another. Traditionally, though, such restrictions have not been extended to speech, not only due to speech being regarded as something that can cause no more than offence, but also due to particular benefits to society attached to freedom of speech by liberalism. Such benefits include, amongst others, diversity, criticism and neutrality. The republican conception of freedom as non-domination, meanwhile, allows for greater restrictions than the liberal position; in part, due to state interference not necessarily being regarded as a breach of freedom. Republican theorists have extended the restrictions they see as legitimate to include restrictions upon speech; although the benefits of freedom of speech are also advocated by the republican tradition. Hence the propositions of this thesis are that:

- *A republican constitution offers a basis for limiting both pornography and racist hate speech while securing a normal range of liberal rights.*
- *Whilst liberals would argue that securing these rights also requires allowing freedom for racist hate speech and pornography.*

Both pornography and racist hate speech have been referred to as 'hard cases' when considering the extent of freedom of speech that

individuals should be granted. In part, this label has emerged due to critics of these forms of speech arguing that they cause tangible harm. However, those whose aim is the protection of these forms of speech argue that their restriction is detrimental to individual freedom. Amongst those making calls for restrictions are anti-pornography radical feminists¹ and critical race theorists. This thesis takes up the position of the radical feminists and critical race theorists. The two theorists whose work will be focused on are Catharine MacKinnon and Andrea Dworkin. Both pornography and racist hate speech are identified by them as capable of causing more than offence, that is to say, as capable of causing tangible harm. It is important to note here that the harm referred to by Dworkin and MacKinnon is of a kind not acknowledged by liberals. Restrictions based on harm are in line with the liberal *harm principle*. The liberal conception of harm is developed along the same lines as its conception of freedom, harm generally referring to a physical interference. From a radical feminist and critical race theory (CRT) perspective, though, harm is also recognised as caused by domination. As a result, the radical feminist and CRT positions accept that speech, which they consider as capable of producing domination, can cause tangible harm as opposed to mere offence.²

These two forms of speech are also identified as ones that we should be particularly concerned with; partly due to both becoming more prevalent in society. The linking of these two forms of speech in this thesis is in part dependant on the harm that is caused by them, as well as by the way in which the harm is caused, through the production of the speech leading to domination. These two forms of speech are also linked by the fact that they are regarded as resulting in the social exclusion and silencing of historically disadvantaged groups: women in the case of pornography and ethnic minorities in the case of racist hate speech.

¹ Henceforth in this thesis the anti-pornography radical feminists will be referred to as the radical feminists. Although radical feminism covers much more than the anti-pornography stance this will facilitate the legibility of the thesis.

² When referring to harm in relation to radical feminists and critical race theorists, it is important to note that harm as derived from domination is to be considered as included in what is being referred to as harm throughout this project. This conception of harm will be further developed upon in Chapters 3 and 4.

In order to ascertain the validity of the radical feminist and CRT positions, as well as the hypothesis that a republican constitution would be more suitable for making restrictions upon both these forms of speech, they will be assessed from a liberal and a republican position. Through this assessment, it should be possible to determine whether restrictions upon these forms of speech are indeed possible without breaching generally accepted liberal rights. It will be demonstrated that although the radical feminist perspective is not illiberal, there are elements within liberal theory which they find lacking. In particular, radical feminists believe liberalism ignores issues of power and domination when assessing the harms caused by pornography and the legitimacy of placing restrictions upon it. Particular focus will be given in this thesis to two liberal rationales for sustaining freedom, rights based rationales, exemplified by the work of Ronald Dworkin, and harm based rationales, as derived from the work of John Stuart Mill. These are the two variants that the radical feminists focus their critique of liberalism on. Although those working from these perspectives have considered whether pornography and racist hate speech could constitute sufficient harm to justify restrictions upon the speech, they mostly conclude that it does not.

In contrast to liberalism, neo-Roman republicanism has a conception of freedom as non-domination. Thus, it seemingly takes into account the elements which the radical feminists find lacking in liberalism. Meanwhile, the radical feminists have a greater focus on harm alone as sufficient grounds for restricting freedom than republicans. Whilst demonstrating that the radical feminist perspective is not illiberal, it will be aligned with republican theory.³ This alignment, the reading of these two theoretical schools in parallel, will provide the radical feminist stance with a clearer conception of liberty, that of freedom as non-domination. Although the radical feminists are concerned with issues of liberty throughout their critique of pornography, arguing that restrictions upon such speech are a valid infringement of liberty due to the

³ What is meant by alignment with regards to republicanism and the radical feminist position will be defined in Chapter 1.

harms caused by pornography, they devote little time to developing a conception of liberty itself. Freedom as non-domination allows for a broader approach than freedom as non-interference, one that sees freedom as inhibited by more than interference and harm. It has a broader appreciation of inhibitions on freedom beyond harm. In so doing, though, republicans are not being anti-liberal, if that is taken to mean disregarding rights. Rather, it's that reducing domination can require interference and interference can be administered in a non-dominating, democratic way. This republican argument formalises what is implicit in much of the radical feminist and CRT literature. Meanwhile, the focus on harm found in radical feminist theory will enhance the republican perspective; whilst also adding a precise definition of pornography from which to work, something which those republicans who accept restrictions on pornography fail to provide.

A further rationale for the aligning of republicanism with the radical feminist position centres on concerns with equality. Republicanism places greater weight upon political equality than the liberal tradition. In addition, republicans conceive rights as dependant on the equal rights of others. As a result, in the instance of there being an inequality, redressing this could be regarded as of greater importance for the enhancement of freedom as non-domination than the cost of breaching an individual's freedom through interference. Besides the concerns over harm and domination, the radical feminist and CRT positions regard pornography and racist hate speech as adding to the unequal status of women and ethnic minorities. As a result of these concerns, MacKinnon develops a conception of equality not as sameness but as a lack of hierarchy,⁴ a position that I believe advances the alignment with republicanism.

The liberal and republican positions will be tested further by exploring the possibility of restrictions upon political speech, in the instance of it constituting extreme right racist hate speech. It is important to note that both the liberal and republican traditions favour free political speech. Despite this opposition to restrictions on political speech there remains theoretical room

⁴ This will be further developed in Chapter 4. For MacKinnon's conception of equality see: MacKinnon, C.A. *Sex Equality*. New York: Foundation Press, (2007).

within liberalism and republicanism for the radical feminist restrictions to not simply be dismissed. In order to strengthen the theoretical work carried out and to further test the propositions, an illustrative case study will also be completed. A state with a republican constitution, Finland, and a state with a liberal constitution, Spain, will be compared in order to illustrate the normative work in the thesis. By explaining what their respective constitutions have allowed by way of legislation on these areas, these cases reveal how the normative links made regarding both these forms of speech may be connected in practice. The suitability of choosing Spain and Finland as case study countries and what constitutes a liberal and a republican constitution will also be assessed.

The following section will indicate why I consider the extreme right as a problem that political theorists should be concerned with. I will briefly examine the growth of the extreme right in Europe. After that, I will highlight why pornography is a problem that political theorists should be concerned with. I will briefly examine the growth of the pornographic industry. The introduction will end with an outline of the thesis.

The Extreme Right and Racism

After the defeat of the Axis powers (Germany, Italy, Japan and their allies) in World War II in 1945, many believed that extreme nationalist ideologies of the right would disappear. The dangers of such ideologies had been demonstrated by the horrors carried out by, predominantly, the NSDAP (National Socialist German Workers' Party or Nazi party) during the Holocaust. 1945, though, was not to signal the end of such movements. Moreover, despite a considerable respite in extreme right activities after World War II, there has been a resurgence in such activities in Western Europe, as well as in other parts of the world, for some time. The extreme right resurgence in Western Europe is considered to date back to the late

1970s;⁵ although the vast majority of those assessing this resurgence date it to the early 1980s.⁶

There is a general consensus that by the end of the 1980s the extreme right resurgence in Western Europe was a concerning issue for Western liberal democracies. Such concern grew during the 1990s, as extreme right parties increased in popularity; by this time achieving considerable electoral successes and becoming significant players in the politics of some countries; most notably in France, Belgium, Italy and Austria.⁷ As the twentieth century drew to a close and the twenty-first century got under way, the popularity of the extreme right increased. In the 1999 Austrian elections the extreme right *Freiheitliche Partei Österreichs* (Austrian Freedom Party – FPÖ) gained 27% of the national vote; thereby becoming the second biggest party in the country and forming part of the ruling coalition. In the 2001 Danish elections the extreme right *Dansk Folkeparti* (Danish People's Party) became part of the ruling coalition after obtaining 12% of the national vote. In the 2002 French presidential election Jean-Marie Le Pen, leader of the extreme right *Front National* (National Front – FN), came second, having received more votes than the main left candidate Lionel Jospin.⁸ In addition, the September 11th 2001 terrorist attack on the *World Trade Centre* in New York City by Muslim extremist further fuelled the popularity of the extreme right; as have numerous other factors affecting the world today such as increased immigration, including a rise in asylum

⁵ Carter, E. *The Extreme Right in Western Europe – Success or Failure?*. Manchester: Manchester University Press, (2005) p. 1; Kitschelt, H. *The Radical Right in Western Europe – A Comparative Analysis*. Michigan: The University of Michigan Press, (1995), p. 1.

⁶ See: Eatwell, R. & Muddle, C. (eds.) *Western Democracies and the Extreme Right Challenge*. London: Routledge, (2004); Eatwell, R. The Rebirth of the 'Extreme Right' in Western Europe. *Parliamentary Affairs*. Vol. 53, No. 3, (2000), pp. 407-42; Klandermans, B. & Mayer, N. (eds.) *Extreme Right Activists in Europe – Through the Magnifying Glass*. London: Routledge, (2006); Hainsworth, P. (ed.) *The Politics of the Extreme Right – From the Margins to the Mainstream*. London: Pinter, (2000); Ignazi, P.I. *Extreme Right Parties in Western Europe*. Oxford: Oxford University Press, (2003).

⁷ See: Carter, E. *The Extreme Right in Western Europe – Success or Failure?*. Manchester: Manchester University Press, (2005), p. 1; Kitschelt, H. *The Radical Right in Western Europe – A Comparative Analysis*. Michigan: The University of Michigan Press, (1995), p. 1; Ignazi, P.I. *Extreme Right Parties in Western Europe*. Oxford: Oxford University Press, (2003), p. 1.

⁸ Eatwell, R. & Muddle, C. (eds.) *Western Democracies and the Extreme Right Challenge*. London: Routledge, (2004), p. 133.

seekers into Western Europe; economic hardship; and a growing discontent with liberal democracy.⁹

The end of the 1980s and beginning of the 1990s should have signalled the onset of a liberal democratic governmental norm; the communist Soviet Union had collapsed and China was moving towards marketisation. Such an order, though, did not materialise, and “as we move into the new Millennium there are growing signs that extremism – even in the West, is far from dead – that we celebrated prematurely the victory of democracy”.¹⁰ The challenges to democracy have not only come from the extreme right in Western Europe, though, but also from extreme right activities in Eastern Europe and North America; a revival of communist parties in the former Soviet bloc; and extremism in Latin America and the Middle East.¹¹ Moreover, the rise in extreme right parties has not happened in isolation. Rather, these electoral gains are “merely the most visible aspect of a broader wave of right-wing activism and activities”;¹² with such activities ranging from racially motivated language to historical revisionism.

The threat of the extreme right in Western Europe, as well as elsewhere, is now taken seriously; not only due to the growth in numbers and support for extreme right parties but also due to the fact that “this growing electoral success has often been translated into significant influence over the shape and nature of government coalitions, important policy decisions, and the electoral strategies of mainstream parties”.¹³ Empirical studies suggest that mainstream parties will shift their ideology, on a left-right spectrum, in accordance with public opinion; with the success of niche parties, amongst

⁹ The different reasons for extreme right support and the conditions under which these have been growing are beyond the scope of this project. For an analysis see: Carter, E. *The Extreme Right in Western Europe – Success or Failure?*. Manchester: Manchester University Press, (2005); Kitschelt, H. *The Radical Right in Western Europe – A Comparative Analysis*. Michigan: The University of Michigan Press, (1995); Eatwell, R. & Muddle, C. (eds.) *Western Democracies and the Extreme Right Challenge*. London: Routledge, (2004); Ignazi, P.I. *Extreme Right Parties in Western Europe*. Oxford: Oxford University Press, (2003).

¹⁰ Eatwell, R. & Muddle, C. (eds.) *Western Democracies and the Extreme Right Challenge*. London: Routledge, (2004), p. x.

¹¹ *Ibid.* p. xi.

¹² Merkl, P.H. & Weinberg, L. (eds.) *Right-Wing Extremism in the Twenty-First Century*. London: Frank Cass, (2003), p. 75.

¹³ Golder, M. Explaining Variations in the Success of Extreme Right Parties in Western Europe. *Comparative Political Studies*. Vol. 36, No. 4, (May – 2003), pp. 432-433.

which would be included extreme right parties, regarded as a reflection of public opinion.¹⁴ It is further suggested that mainstream parties tend to shift their policy positions in the same direction their opponents shifted in the previous election; with parties being particularly responsive to shifts within their own 'ideological family'.¹⁵ It would therefore seem plausible to conclude that a rise in extreme right parties will result in mainstream parties of the right shifting further right and adopting some of the extreme right's ideals. Immigration policy in Western Europe can be regarded as an example of this process, with it having become a mainstream campaign topic that was introduced by niche parties.¹⁶

The issue of mainstreaming is central to this project; I argue that the issues that arise from mainstreaming add to the arguments in favour of restrictions upon extreme right racist hate speech and pornography. Mainstreaming enhances the potency of these forms of speech, as they are legitimised through absorption into society. When mainstream parties recognise the electoral potential of a niche party issue, they elevate its place on the electoral agenda.¹⁷ Moreover, due to the mainstream taking on some of the ideas, the niche parties move further to the extremes in order to maintain their potency.¹⁸

As a result of this growth in the extreme right and the mainstreaming of some of its ideals, it is argued that "racism has once more become a truly serious problem in Europe",¹⁹ with it manifesting itself in the form of discrimination; social exclusion; unequal opportunities in the labour market and education system; and unequal access to positions of power and

¹⁴ Adams, J. Clark, M. Ezrow, L. & Glasgow, G. Are Niche Parties Fundamentally Different from Mainstream Parties? The Causes and the Electoral Consequences of Western European Parties' Policy Shifts, 1976-1998. *American Journal of Political Science*. Vol. 50, No. 3, (July 2006), pp. 513-529.

¹⁵ Adams, J. & Somer-Topcu, Z. Policy Adjustment in Response to Rival Parties' Policy Shifts: Spatial Theory and the Dynamics of Party Competition in Twenty-Five Post War Democracies. *British Journal of Political Science*. Vol. 30, (2009), pp. 825-846.

¹⁶ Meguid, B.M. Competition between Unequals: The Role of Mainstream Party Strategy in Niche Party Success. *The American Political Science Review*. Vol. 99, No. 3, (Aug, 2005), p. 35.

¹⁷ Ibid. p. 34.

¹⁸ As will be elaborated upon in the following section, this is paralleled in pornography.

¹⁹ Merkl, P.H. & Weinberg, L. (eds.) *Right-Wing Extremism in the Twenty-First Century*. London: Frank Cass, (2003), p. 97.

influence.²⁰ There is, however, no consensus as to how this threat should be dealt with. An answer has yet to be provided by academics, policy analysts or politicians as to how we should best deal with the extreme right in order to contain its success; or even whether containing its success should be what is aimed for, in the instance of the extreme right representing the electoral choice of the majority. Despite there being no consensus, three main strategies for containing the extreme right can be identified. Firstly, efforts to influence public opinion; governments try to educate and inform citizens on inter-ethnic relations, World War II, the Holocaust, etc. in an attempt to discourage people from turning to the extreme right by demonstrating the ways in which it can be dangerous. Secondly, remedying the causes of attraction to right wing extremism; there is an understanding that growing unemployment and more general dissatisfaction with government can lead people to turn to the extreme right; therefore governments attempt to alleviate these societal issues in order to decrease the appeal of the extreme right. Thirdly, influencing the amount of speech that the extreme right has, notably by limiting their speech through legal restrictions.²¹

Of the above three strategies for containing the extreme right, the first two, efforts to influence public opinion and remedying the causes of attraction to right wing extremism, are generally acceptable to liberals, though, not uncontroversially so. In particular, the first recommendation can be considered as unacceptable political interference in, for example, education. The third strategy generally faces stronger criticisms of unacceptable political interference. It is the third strategy, though, that I will pursue in this project, demonstrating that despite the criticisms it is an effective strategy that need not be considered illiberal.

Pornography

Like the extreme right, pornography has also been growing, with a particular increase in production taking place since the 1980s. It has, in fact, grown

²⁰ Eatwell, R. & Muddle, C. (eds.) *Western Democracies and the Extreme Right Challenge*, London: Routledge, (2004), pp. 2-3.

²¹ Merkl, P.H. & Weinberg, L. (eds.) *Right-Wing Extremism in the Twenty-First Century*. London: Frank Cass, (2003), p. 272.

beyond recognition. Irrespective of this growth, the issue of pornography as a potentially harmful form of speech has not been assessed, from a political theory perspective, in a way that reflects the immense changes that pornography has undergone; despite the fact that it is accepted that the pornography debates of the 1970s, out of which spawned the radical feminists, have been reignited by the onset of Internet pornography.²² Although the changes in pornography have been well documented, with the possible implications of these changes considered, such studies have tended to come from academics in the fields of cultural studies, and film and media studies.²³

Debates surrounding possible restrictions upon pornography have often centred on feminist critiques. On one side of the feminist debate stand the radical feminists, on the other, what are referred to as pro-sex feminists.²⁴ Irrespective of whether they are for or against restrictions upon pornography, be they feminists or not, one thing that all current commentators on the issue agree on is the fact that pornography is a growing industry.²⁵ Furthermore, feminists on both sides of the debate also agree that the vast majority of heterosexual pornography produced is misogynist and racist; pro-sex feminists are not necessarily in favour of the pornography that exists but of pornography as a concept.²⁶

Pornography has grown in a number of different ways. Not only has what is available grown in diversity and quantity, but the ways and ease with

²² McNair, B. *Striptease Culture – Sex, Media and the Democratization of Desire*. London: Routledge, (2002), p. 7.

²³ See: Attwood, F. (ed.) *Porn.Com – Making Sense of Online Pornography*. New York: Peter Lang, (2010); Weitzer, R. (ed.) *Sex for Sale – Prostitution, Pornography and the Sex Industry*. New York: Routledge, (2010); Kammeyer, K.C.W. *A Hypersexual Society – Sexual Discourse, Erotica and Pornography in America Today*. New York: Palgrave Macmillan, (2008); Paul, P. *Pornified – How Pornography is Transforming our Lives, our Relationships and our Families*. New York: Times Books, (2005); McNair, B. *Striptease Culture – Sex, Media and the Democratization of Desire*. London: Routledge, (2002); Attwood, F. (ed.) *Mainstreaming Sex – The Sexualisation of Western Culture*, London: I.B. Tauris, (2009); Paasonen, S. Nikunen, K. & Saarenmaa, L. (eds.) *Pornification – Sex and Sexuality in Media Culture*. Oxford: BERG, (2007).

²⁴ The pro-sex feminist position is discussed in Chapter 4.

²⁵ See: Lane, F.S. III. *Obscene Profits – The Entrepreneurs of Pornography in the Cyber Age*. New York: Routledge, (2000); Paasonen, S. Nikunen, K. & Saarenmaa, L. (eds.) *Pornification – Sex and Sexuality in Media Culture*. Oxford: BERG, (2007); Attwood, F. (ed.) *Porn.Com – Making Sense of Online Pornography*. New York: Peter Lang, (2010); Weitzer, R. (ed.) *Sex for Sale – Prostitution, Pornography and the Sex Industry*. New York: Routledge, (2010).

²⁶ Boyle, K. *Media and Violence – Gendering the Debates*. London: SAGE Publications, (2005), p. 37.

which people can access it have also increased. Pornography has grown to such an extent, in fact, that it is now described as “one of the most successful global media industries”.²⁷ The growth in the accessibility of pornography has been taking place since the late nineteenth century, as printing and photographic technology developed.²⁸ Technological developments have, in fact, often been at the forefront of an increase in the production of pornography. This link with technology is what has resulted in pornography experiencing a particularly sharp growth since the 1980s. The technological revolution that has been taking place since then has also resulted in a revolution in pornographic production. The development of home video in the 1980s and growth of the Internet in the 1990s have catapulted the pornographic industry forward.²⁹ Technological developments have made pornography more accessible, as it is now far easier to distribute the material; and cheaper to produce, which not only makes it easier for people to access it but also results in it being a more profitable business for those making it.³⁰ Although data on pornographic production and consumption is generally speculative, due to the industry not releasing precise figures, when the data that is available is assessed the growth is clear. For example, the pornographic film rental revenue in the United States increased from \$75 million in 1985 to \$957 million in 2006. In addition, the number of pornographic films released in the United States increased from 5,700 in 1995 to 13,588 in 2005.³¹ Furthermore, those investing in pornography have also changed. Rather than it being what was once considered a ‘dirty’ business, large and ‘reputable’ corporations such as *General Motors*, *AT & T Corp.*, *Time Warner*, *Hilton* and *Marriott*

²⁷ McKee, A. Albury, K. & Lumby, C. *The Porn Report*. Melbourne: Melbourne University Press, (2008), p. 20.

²⁸ Attwood, F. (ed.) *Porn.Com – Making Sense of Online Pornography*. New York: Peter Lang, (2010), p. 55.

²⁹ McNair, B. *Striptease Culture – Sex, Media and the Democratization of Desire*. London: Routledge, (2002), p. 38.

³⁰ Attwood, F. (ed.) *Porn.Com – Making Sense of Online Pornography*. New York: Peter Lang, (2010), p. 57.

³¹ Weitzer, R. (ed.) *Sex for Sale – Prostitution, Pornography and the Sex Industry*. New York: Routledge, (2010), p. 1.

International, to name but a few, all have subsidiaries which either produce or distribute pornographic material.³²

It was mentioned in the previous section that a particular concern with the extreme right centres on the mainstreaming of their ideals, as mainstream parties adopt extremist views in order to limit the support that the extreme right would otherwise obtain. The issue of mainstreaming is also at the forefront of the pornography debate. Alongside the growth of the pornographic industry, the mainstreaming of pornographic material in society is accepted by both sides of the pornography debate; with mainstreaming of pornography being identified in the music and fashion industries, in celebrity culture and in advertising. This trend is often referred to as pornification.³³ The mainstreaming of pornography on a mass level in Western societies is traced back to the sexual revolution of the 1960s. By the mid-1960s mainstream celebrities such as Jane Fonda began appearing in pornographic magazines such as *Playboy*.³⁴ By the 1970s feature-length pornographic films started to achieve mainstream success, as did those who starred in them; such films included *Deep Throat*, *Debbie Does Dallas* and *Behind the Green Door*.³⁵ Despite its growing popularity and the beginnings of pornification, though, representations of pornography remained predominantly negative until the late 1980s, when positive representations of pornography began to emerge in the media. From these positive representations developed what came to be labelled as *porno-chic*,

³² Church Gibson, P. (ed.) *More Dirty Looks – Gender, Pornography and Power*. London: bfi Publishing, (2004), p. 45.

³³ See: Poynor, R. *Designing Pornotopia – Travels in Visual Culture*. London: Laurence King Publishing, (2006); Paasonen, S. Nikunen, K. & Saarenmaa, L. (eds.) *Pornification – Sex and Sexuality in Media Culture*. Oxford: BERG, (2007); McNair, B. *Striptease Culture – Sex, Media and the Democratization of Desire*. London: Routledge, (2002); Attwood, F. (ed.) *Mainstreaming Sex – The Sexualisation of Western Culture*. London: I.B. Tauris, (2009); Paul, P. *Pornified – How Pornography is Transforming our Lives, our Relationships and our Families*. New York: Times Books, (2005).

³⁴ Lane, F.S. III. *Obscene Profits – The Entrepreneurs of Pornography in the Cyber Age*. New York: Routledge, (2000), pp. 84-85.

³⁵ *Deep Throat* was released in the USA in 1972. *Debbie Does Dallas* was released in the USA in 1978. *Behind the Green Door* was released in the USA in 1972. Paasonen, S. Nikunen, K. & Saarenmaa, L. (eds.) *Pornification – Sex and Sexuality in Media Culture*. Oxford: BERG, (2007), p. 23.

“representations of pornography in non-pornographic art and culture”.³⁶ The mid 1990s are recognised as the beginning of a significant increase in *pornochic*, with television programmes about pornography being aired on a regular basis; such programmes included *Eurotrash* and *Red Light Zone*.³⁷

A number of trends are apparent in today’s society as a result of pornification. The mainstreaming of pornography has, in fact, been so successful, that some even argue that today there remains “scarcely an image, entertainment, fashion or advertisement untouched by it”.³⁸ Consumption of pornography has become an accepted form of home entertainment.³⁹ In the film and television industries relaxed censorship has meant an increasing amount of sexually explicit images,⁴⁰ as well as an increase in films and television programmes about the sex industry.⁴¹ The culture of celebrity has extended to pornography to such a level that those who star in pornography now have celebrity status. Traci Lords, a notorious star of pornographic movies renowned for having featured in over 100 pornographic films between the ages of 15 and 18, has successfully transitioned into mainstream films.⁴² Jenna Jameson, another star of pornographic films, can be found in the halls of *Madame Tussauds*, Las Vegas.⁴³ The music industry and advertising have also played a part in the celebrity status of pornographic film stars, with the likes of Jenna Jameson

³⁶ McNair, B. *Striptease Culture – Sex, Media and the Democratization of Desire*. London: Routledge, (2002), p. 61.

³⁷ *Eurotrash* aired in the United Kingdom between 1993 and 2005. *Red Light Zone* aired in the United Kingdom in 1995. McNair, B. *Striptease Culture – Sex, Media and the Democratization of Desire*. London: Routledge, (2002), p. 82.

³⁸ McNair, B. *Striptease Culture – Sex, Media and the Democratization of Desire*. London: Routledge, (2002), p. 61.

³⁹ Church Gibson, P. (ed.) *More Dirty Looks – Gender, Pornography and Power*. London: bfi Publishing, (2004), p. 45.

⁴⁰ *Ibid.* p. vii.

⁴¹ Attwood, F. (ed.) *Mainstreaming Sex – The Sexualisation of Western Culture*. London: I.B. Tauris, (2009), p. 3.

⁴² Kammeyer, K.C.W. *A Hypersexual Society – Sexual Discourses, Erotica and Pornography in America Today*. New York: Palgrave Macmillan, (2008), P. 139.

⁴³ Paasonen, S. Nikunen, K. & Saarenmaa, L. (eds.) *Pornification – Sex and Sexuality in Media Culture*. BERG: Oxford, (2007), p. 1.

appearing in numerous music videos and advertisements;⁴⁴ both these latter industries have also started producing material in a pornographic style.⁴⁵

Concerns over the mainstreaming of pornography do not only stem from the impact that this may be having on representations of women,⁴⁶ but also from the kinds of pornography that are being produced as a result of pornification. What was once considered soft-core pornography is no longer considered pornography at all, with what is considered *real* pornography becoming increasingly hard-core and extreme.⁴⁷ “While pornography has seeped into mainstream culture, the images that remain confined to the porn world have become increasingly intense”.⁴⁸ The increased intensity has resulted in pornography becoming more violent and non-consensual.⁴⁹ As pornography, in part, relies on breaking social taboos for its appeal, the growing sexualisation of society has resulted in a new shock-porn.⁵⁰ Shock-porn refers to combinations of sex and violence, humiliation, suffering and terror.⁵¹

The concern over shock-porn relates both to the violent and explicit nature of the images themselves and to the fact that “the genital acts required of female performers in the new hardcore genres are increasingly risky in terms of HIV transmission”⁵² and general health.⁵³ Another issue arising from the mainstreaming of pornography relates to how, through pornification, pornography has shifted from the private to the public sphere. Pornography is no longer “something situated in the boundaries of the public: on the contrary, it is manifested in mainstream publicity, media and (semi)

⁴⁴ Levy, A. *Female Chauvinist Pigs – Women and the Rise of Raunch Culture*. London: Free Press, (2005), p. 18.

⁴⁵ Attwood, F. (ed.) *Mainstreaming Sex – The Sexualisation of Western Culture*. London: I.B. Tauris, (2009), p. xiii.

⁴⁶ Gill, R. *Gender and the Media*. Cambridge: Polity, (2007), p. 111.

⁴⁷ Paul, P. *Pornified – How Pornography is Transforming our Lives, our Relationships and our Families*. New York: Times Books, (2005), p. 5.

⁴⁸ *Ibid.* p. 8.

⁴⁹ *Ibid.* p. 58.

⁵⁰ McNair, B. *Striptease Culture – Sex, Media and the Democratization of Desire*. London: Routledge, (2002), p. 42.

⁵¹ Attwood, F. (ed.) *Porn.Com – Making Sense of Online Pornography*. New York: Peter Lang, (2010), p. 122.

⁵² Attwood, F. (ed.) *Mainstreaming Sex – The Sexualisation of Western Culture*. London: I.B. Tauris, (2009), p. 51.

⁵³ The concerns are also related to the harms that the radical feminist position attributes to violent pornography; these harms are further explored in Chapters 1 and 4.

public spaces of various kinds”.⁵⁴ This shift into the public sphere is coupled with the fact that the technological developments that have been taking place since the 1990s, predominantly the Internet, have also pushed pornography further into the private sphere. The new technologies mean that pornography can now be purchased and consumed in total anonymity and privacy.⁵⁵

The shifting of pornography between the private and public sphere exacerbates the ways in which pornography is now a political issue and an issue that should be considered by political theorists. Although feminists have often argued that the private is political, from both liberal and republican perspectives it is the public that is considered political. With pornography now present in both the private and public spheres, it is difficult to see how any of the ideological positions could merely disregard it as a non-political issue.⁵⁶ Although the recognition of pornography as a political issue will also result in greater criticisms against restrictions being placed upon it from a liberal stance, I will argue that due to the domination of women that can result from pornography, curtailing it is, in fact, a favourable strategy.

Thesis Structure

The thesis is divided into two parts, with the first part focusing on theory and the second part on practice.

Part one begins by clarifying the main terms that are used in the thesis. *Chapter 1 – Definitions:* provides the definitions of pornography, the extreme right, racist hate speech and alignment that will be applied in the thesis. Pornography and racist hate speech will be defined in accordance with radical feminism and CRT. This chapter also demonstrate how these definitions are valid and distinct. In addition, the similarities and differences between these forms of speech are assessed in order to confirm their linkage in the thesis. The assessment of the extreme right, meanwhile, takes into consideration the difficulties that have arisen when attempts have been

⁵⁴ Paasonen, S. Nikunen, K. & Saarenmaa, L. (eds.) *Pornification – Sex and Sexuality in Media Culture*. Oxford: BERG, (2007), p. 7.

⁵⁵ McNair, B. *Striptease Culture – Sex, Media and the Democratization of Desire*. London: Routledge, (2002), p. 38.

⁵⁶ Issues relating to the placing of pornography in the public and private spheres are further discussed in Chapters 2 and 3.

made to define this term. The last term to be explored in this chapter will be alignment; exploring how the term is being used in the thesis with regard to the connections between republicanism and radical feminism and liberalism and republicanism and the case study constitutions. *Chapter 2 – Liberalism and Freedom of Speech:* explores three liberal rationales for sustaining freedom and freedom of speech, as derived from rights, harm and autonomy, focusing on the two forms of speech central to the thesis. Through this analysis the gaps in the liberal literature that may be filled by the radical feminist and CRT perspectives are exposed. *Chapter 3 – Republicanism and Freedom of Speech:* explores the republican perspective on freedom and freedom of speech, again focusing on pornography and racist hate speech. Republican concerns with power and domination, both of which are absent from the liberal stance, are central to this analysis as these are pivotal in the argument in favour of legitimate restrictions upon the two forms of speech. In addition, traditional feminist critiques of republican theory are also addressed in order to strengthen the alignment between republican ideals and radical feminism. The first part of the thesis ends with *Chapter 4 – The Anti-Pornography Radical Feminist Position:* here the radical feminist and CRT cases for restrictions upon pornography and racist hate speech are elaborated upon. The ways in which these forms of speech can dominate are assessed. Through a republican conception of freedom as non-domination the possibilities of restricting these forms of speech without breaching a normal range of liberal rights are further expanded upon. In addition, feminist critiques of such restrictions are also tackled.

Part two deals with how the theory explored in part one may be applied in practice, through the case study illustration. The first chapter of part two, *Chapter 5 – A Liberal and a Republican Constitution:* works as a link between the two parts of the thesis. In order to address the two propositions regarding a liberal and a republican constitution it is necessary to ascertain what shape a liberal and a republican constitution would take. A constitutional blueprint for liberalism and republicanism is drawn up in this chapter. These blueprints are then applied to the Finnish and Spanish cases in *Chapter 6 – The Finnish and Spanish Constitutions.* Through this

assessment the validity of using these as case study countries will be ascertained. The following two chapters comprise the case study illustration. *Chapter 7 – Pornography and the Position of Women in Spain and Finland:* looks at free speech legislation on pornography in both the countries in order to test the propositions regarding liberal and republican constitutions. Meanwhile, an interpretation will be offered of how this legislation has affected the position and views of women in each of the countries. *Chapter 8 – The Extreme Right in Spain and Finland:* looks at free speech legislation regarding racist hate speech in each of the countries. It offers an interpretation of how the relevant legislation has affected the development of the extreme right in each of the countries.

The concluding chapter of the thesis will readdress the two propositions: *A republican constitution offers a basis for limiting both pornography and racist hate speech while securing a normal range of liberal rights; whilst liberals would argue that securing these rights also requires allowing freedom for racist hate speech and pornography.* The work carried out in the previous chapters will be brought together in order to draw conclusions regarding these hypotheses. In addition, the contribution that this thesis provides to the literature is addressed alongside problems and limitations of the thesis and possible further research that may be carried out.

Chapter One

Definitions

This chapter will provide the working definitions of four key terms in this project, and evaluate the validity of linking pornography with racist hate speech. The first term to be defined will be the extreme right. Different evaluations and identifying characteristics will be explored in order to identify what is referred to as the extreme right in this project. The second term to be assessed will be pornography. Conventional definitions of pornography will be assessed alongside the radical feminist definition. Through this evaluation, the distinctive features of the radical feminist definition will be considered. In addition, the way in which radical feminists have extended their critique of pornography to hate speech and racist hate speech will also be analysed. The third term will be racist hate speech. Conventional definitions of racist hate speech will be assessed alongside the CRT definition. CRT will be used alongside the radical feminist critique as this offers a far more extensive analysis of racist hate speech. Although the radical feminists tackle racist hate speech, they are more focused on a broader hate speech. The validity of using CRT for this particular task is partly based on it being heavily influenced by radical feminist theory and its concerns with power and domination.⁵⁷ Once the working terms have been identified the similarities and differences between pornography and racist hate speech will be assessed in order to ascertain the validity of applying the radical feminist model onto a racist hate speech case. The fourth term to be assessed will be alignment. An alignment between radical feminism and republicanism is being proposed in this thesis. Moreover, alignment as a concept also facilitates the interpretations of the case study constitutions as either liberal or republican. Alignment in this thesis is derived from Weber's use of elective affinity, the definition of elective affinity will be explored whilst differentiating it from causal explanations.

⁵⁷ Delgado, R. & Stefancic, J. *Critical Race Theory – An Introduction*. New York: New York University Press, (2001), p. 5.

The radical feminist definition of pornography that will be focused on is that developed by Catharine MacKinnon and Andrea Dworkin. This definition has been chosen due to Dworkin and MacKinnon providing the most extensive radical feminist definition of pornography. In addition, their definition is located within a framework which covers the central concerns that radical feminists have regarding pornography. As Hawkins and Zimring note, "it remains true that the most forceful statement of the radical feminist critique of pornography may be found in two books by American authors: Andrea Dworkin's *Pornography: Men Possessing Women* and Catharine A. MacKinnon's *Feminism Unmodified: Discourses on Life and Law*".⁵⁸

A common misunderstanding relating to radical feminism centres around it being viewed as opposed to all sexually explicit material.⁵⁹ Due to the difficulties that have arisen because of this misperception, the radical feminists repeatedly clarify that their aim "has never been to ban sexually explicit material"⁶⁰ per se. Through this misunderstanding, or, as some argue, misinterpretation of the theory,⁶¹ the radical feminists have been positioned alongside the moralist right wing, who also call for restrictions on pornography. The radical feminists also clearly state throughout their works that although some of the restrictions they call for are also advocated by the moralist right wing, their rationale is vastly different; conventional morality and obscenity are not points of concern for the radical feminists.

Central to the radical feminist stance not being misinterpreted is a clear definition of pornography. Through this definition, their stance is clearly differentiated from that of the moralist right wing, and the fact that they are not opposed to sexually explicit material per se is established. Through a clear definition the radical feminist task of demonstrating the harms that result from pornography is also facilitated.

⁵⁸ Hawkins, G. & Zimring, F.E.Z. *Pornography in a Free Society*. Cambridge: Cambridge University Press, (1999), p. 153.

⁵⁹ For example of this refer to: Church Gibson, P. & Gibson, R (eds.) *Dirty Looks – Women, Pornography, Power*. London: NFI Publishing, (1993); Cossman, B. Bell, S. Gotell, L. & Ross, B.L. *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision*. Toronto: University of Toronto Press, (1997).

⁶⁰ Dines, G. Jensen, R. & Russo, A. *Pornography – The Production and Consumption of Inequality*. New York: Routledge, (1998), p. 9.

⁶¹ MacKinnon, C.A. *Women's Lives – Men's Laws*. London: Harvard University Press, (2005), p. 266.

1.1 Defining the Extreme Right

Although intuitively the majority of those with an interest in politics would have an idea of what the extreme right references, irrespective of whether they are able to provide a precise definition or not; academically, the problems of defining the extreme right have been well documented. “Almost every scholar of right-wing extremism has pointed to the difficulties associated with defining the concept”.⁶² There are two principal reasons why these definitional problems have arisen. Firstly, those of the extreme right, unlike, for example, Marxists, do not draw from a single body of literature in order to classify themselves. Moreover, few of those branded as belonging to the extreme right classify themselves as such, in part due to the negative connotations associated with World War II.⁶³ Secondly, the nationalist element of the extreme right, nationalism being one of the characteristics attributed to such movements, has made it difficult for generalisations to be made between countries about what the extreme right represents.⁶⁴ Despite these problems, though, there does seem to be agreement that “right-wing extremism refers to a particular form of ideology”⁶⁵ which can be defined.

Besides these two problems, another definitional issue has arisen from the fact in the literature there is no consensus as to whether extreme right is, in fact, the correct terminology. Far right, extreme right, radical right, populist right and neo-fascist are some of the terms that are used, at times interchangeably.⁶⁶ The two terms predominantly used are *radical right* and *extreme right*; some suggest that the term radical right is used more in the United States whilst Europeans tend to prefer extreme right.⁶⁷ There are also suggestions that the favoured term has changed over time. The term radical

⁶² Carter, E. *The Extreme Right in Western Europe – Success or Failure?*. Manchester: Manchester University Press, (2005), p. 14.

⁶³ Merkl, P.H. & Weinberg, L. *Encounters with the Contemporary Radical Right*. Oxford: Westview Press, (1993), p. 4.

⁶⁴ Merkl, P.H. & Weinberg, L. (eds.) *Right-Wing Extremism in the Twenty-First Century*. London: Frank Cass, (2003), p. 4.

⁶⁵ Carter, E. *The Extreme Right in Western Europe – Success or Failure?*. Manchester: Manchester University Press, (2005), p. 14.

⁶⁶ Muddle, C. *Populist Radical Right Parties in Europe*. Cambridge: Cambridge University Press, (2007), p. 12.

⁶⁷ Merkl, P.H. & Weinberg, L. *Encounters with the Contemporary Radical Right*. Oxford: Westview Press, (1993), p. 4.

right became popular after 1945, with it being used to describe groups with similar ideologies to the Nazis and Fascists.⁶⁸ The most common academic term used today, though, is extreme right.⁶⁹ In addition, until the resurgence in the 1980s, the terms neo-fascism and neo-Nazism were far more popular than they are now, in part due to the fact that the extreme right up until that time had tended to associate itself with its wartime predecessors.⁷⁰ During the 1980s, though, a *nouvelle droite* (new right) began to develop, one which distanced itself from Fascism and took on some of the ideas surfacing from another movement growing in the 1980s, neo-Conservatism. These ideas included a questioning of the cost of the welfare state and concerns over high taxation and loss of traditional values. It is this new right that has experienced the most success in the resurgence.⁷¹ This new right cannot be classified as neo-fascist or neo-Nazi, due to the distancing from the wartime ideologies; it can, however, be classified as extreme right, as can the neo-Fascists and neo-Nazis. Hence some have concluded that there are two types of extreme right parties, those that are linked to Fascist and Nazi ideology and those that are not.⁷²

The term extreme right, the most commonly used, will be the one that is used throughout this project. However, it is also accepted that what in the literature is referred to as the radical right or far right is also encompassed within the term extreme right. In part, this acceptance is due to the extreme right being perceived as a political family “whose constituent parts exhibit certain things in common, but that also may be divided into subtypes”;⁷³ parties within a party family share traits despite not being the same.⁷⁴ Before identifying these shared traits, the terms extreme and right will be explored in an attempt to reach the best possible definition.

⁶⁸ Eatwell, R. & Muddle, C. (eds.) *Western Democracies and the Extreme Right Challenge*. London: Routledge, (2004), p. 7.

⁶⁹ *Ibid.* p. 8.

⁷⁰ Ignazi, P. *Extreme Right Parties in Western Europe*. Oxford: Oxford University Press, (2003), p. 1.

⁷¹ *Ibid.* pp. 22-24.

⁷² *Ibid.* p. 33.

⁷³ Hainsworth, P. (ed.) *The Politics of the Extreme Right – from the Margins to the Mainstream*. London: Pinter, (2000), p. 4.

⁷⁴ Muddle, C. *Populist Radical Right Parties in Europe*. Cambridge: Cambridge University Press, (2007), p. 13.

Some suggest that the extreme right means just that, those that are on the extreme of the right,⁷⁵ on the left right spectrum.⁷⁶ The right, meanwhile, has been subdivided into five different types of thought in modern times.⁷⁷ These five types of thought are the reactionary right, the modern right, the radical right, the extreme right and the new right. The *reactionary right* emerged as a response to eighteenth century thought, in particular liberalism's focus on the individual, and defends a return to an *ancien regime* or an idealised past. Today there is considered to be virtually no politically relevant reactionary right.⁷⁸ The *modern right* has the same origins as the reactionary right, in that it is a critique of eighteenth century thought with a focus on liberalism; the modern right, though, does not have a de facto opposition to change. The critique of liberalism provided focuses on four main areas: individualism, universalism, rationalism, and contractual and utilitarian principles.⁷⁹ "The moderate right sought to balance liberalism's individualism with a more collective perspective, stressing units such as the family or nation, and the importance of religion".⁸⁰ The *radical right*, which developed in the nineteenth and late twentieth century, is a response to the rise of socialism as opposed to liberalism; in particular the economic aspects of socialism. The radical right is associated with a desire for strong leadership.⁸¹ The *extreme right*, also developing in the nineteenth and early twentieth century, seeks to attract working class support and is very critical of the left, in particular of its international and class-based aspects. Unlike the reactionary, modern and radical right, the extreme right lacks a strong

⁷⁵ Merkl, P.H. & Weinberg, L. (eds.) *The Revival of Right-Wing Extremism in the Nineties*. London: Frank Cass, (1997), p. 18.

⁷⁶ The validity of using the political left-right spectrum will not be discussed here as it is beyond the scope of this project; it will be accepted that this terminology is the most used political spectrum of beliefs. "The linear spectrum is commonly understood to reflect different political values or contrasting views about economic policy. In terms of values, the spectrum is sometimes said to reflect different attitudes towards equality. Left-wingers are committed to equality and are optimistic about the possibility of achieving it. Right-wingers typically reject equality as either undesirable or impossible to achieve. This is closely related to different attitudes towards the economy, and in particular the ownership of wealth". Heywood, A. *Political Ideologies – An Introduction*. London: Palgrave Macmillan, (2003), p. 17.

⁷⁷ Eatwell, R. & O'Sullivan, N. (eds.) *The Nature of the Right – European and American Political Thought since 1789*. London: Pinter, (1989), p. 63.

⁷⁸ Ibid. pp. 63-65.

⁷⁹ Ibid. pp. 66-67.

⁸⁰ Ibid. p. 67.

⁸¹ Ibid. pp. 68-70.

theoretical basis; whilst the other three have produced political theorists the extreme right has tended to produce propagandists. Unlike the radical right the extreme right also lacks a focus on economic policy.⁸² The *new right*, meanwhile, is a term used to encompass numerous different forms of thought that are critical of both left-wing ideologies and governments.⁸³ There are, inevitably, crossovers between these categories as well as elements of classical thought within them.⁸⁴

Before ascertaining what the principal characteristics of the extreme right may be, the term *extreme* in itself must first be analysed. The term extreme can be traced back to ancient Greece, from a contemporary political context, though, it began to be used after World War I to refer to communists and Fascists.⁸⁵ “In a political or social context *extremism* is typically related to actions and value systems that lie beyond the moral and political centre of society. However, extremism is a notably illusive word to define more precisely”.⁸⁶ Despite this elusiveness, though, from a political perspective a number of different connotations are associated with the term extreme; amongst these are intensity of belief, especially rigidly held views; monoism, as opposed to pluralism, coupled with authoritarianism; and a promotion of violence, although it is important to note that this element has been dropped from most extreme right definitions.⁸⁷

If the extreme right is to be perceived as a party family, the most common traits are the ones that should be focused on. In a study of extreme right groups and what categories are used to define them, 58 different features were identified in existing definitions. The five most common characteristics identified were nationalism, xenophobia, racism, anti-democratic sentiment and a call for a strong state.⁸⁸ Nationalism refers to “a political doctrine that strives for the congruence of the cultural and political

⁸² Ibid. pp. 71-72.

⁸³ Ibid. p. 73.

⁸⁴ Ibid. p. 63.

⁸⁵ Eatwell, R. & Goodwin, M.J. (eds.) *The New Extremism in 21st Century Britain*. London: Routledge, (2010), p. 9.

⁸⁶ Ibid. p. 8.

⁸⁷ Eatwell, R. & Muddle, C. (eds.) *Western Democracies and the Extreme Right Challenge*. London: Routledge, (2004), pp. 8-9.

⁸⁸ Carter, E. *The Extreme Right in Western Europe – Success or Failure?*. Manchester: Manchester University Press, (2005), p. 15.

unit, the nation and the state respectively”.⁸⁹ A monocultural state, both civic and ethnic, is therefore a nationalist aim. Xenophobia refers to a fear of foreigners. The anti-democratic sentiments are generally associated with monoism and authoritarianism.⁹⁰ Calls for a strong state, meanwhile, are derived from a belief in the authority of the state over the individual.⁹¹

Racism is defined by the *Oxford English Dictionary* as:

The belief that all members of each race possess characteristics, abilities, or qualities specific to that race, especially so as to distinguish it as inferior or superior to another race or races. Hence: prejudice and antagonism towards people of other races, esp. those felt to be a threat to one's cultural or racial integrity or economic well-being; the expression of such prejudice in words or actions.⁹²

Three of the other four traits identified as characterising the extreme right feed into the elements of racism present in the ideology. Ethnic homogeneity infers an exclusion of foreigners; as does xenophobia. Monoism is often coupled with an identity politics which differentiates between ‘us’ and ‘them’, and equates them with ‘good’ and ‘bad’.⁹³ From the perspective of the extreme right, racist discourse has moved away from one of superiority to one of difference;⁹⁴ racial hierarchies are replaced by what are described as “irreconcilable cultural differences”.⁹⁵

In contemporary Western European extreme right discourse the racist elements of the extreme right can be predominantly identified in debates regarding immigration policy. The extreme right use immigration politics to scapegoat the ‘other’, “immigrants and foreigners, especially from the developed world, are equated with the alleged or real problems of society: economic decline, cultural dilution, crime and disorder, falling standards in

⁸⁹ Muddle, C. *Populist Radical Right Parties in Europe*. Cambridge: Cambridge University Press, (2007), p. 16.

⁹⁰ Eatwell, R. & Muddle, C. (eds.) *Western Democracies and the Extreme Right Challenge*. London: Routledge, (2004), p. 9.

⁹¹ Merkl, P.H. & Weinberg, L. (eds.) *The Revival of Right-Wing Extremism in the Nineties*. London: Frank Cass, (1997), p. 49.

⁹² www.oed.com (accessed 26/07/10).

⁹³ Muddle, C. *Populist Radical Right Parties in Europe*. Cambridge: Cambridge University Press, (2007), p. 63.

⁹⁴ Eatwell, R. & Muddle, C. (eds.) *Western Democracies and the Extreme Right Challenge*. London: Routledge, (2004), p. 10.

⁹⁵ Eatwell, R. The Rebirth of the ‘Extreme Right’ in Western Europe?. *Parliamentary Affairs*. Vol. 53, (2000), p. 411.

health and education, and so on”.⁹⁶ As the prominent source of racist speech within extreme right discourse, it is this that will be primarily focused on in this project.

1.2 Defining Pornography

Pornography has proven difficult to define, it has been argued, though, that pornography is recognisable irrespective of whether people can articulate a definition of it or not;⁹⁷ as mentioned above, the case of the extreme right can be paralleled in this regard. Part of the difficulty in pinning down a precise definition of pornography has derived from the fact that definitions of pornography “have been notoriously ephemeral”.⁹⁸ In addition, the term pornography has also been used interchangeably with the terms adult-entertainment, erotica, pornographic speech; as well as having been subdivided into soft-core, hard core and fetish.⁹⁹

Pornography is defined in the *Oxford English Dictionary* as:

1. The explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc., in a manner intended to stimulate erotic rather than aesthetic feelings; printed or visual material containing this.
2. A study of prostitution. *Obs.*¹⁰⁰

From a theoretical perspective, though, pornography is often regarded as a concept, as opposed to it merely being a noun representing a given item. Its definition has changed over time and varies across cultures and theoretical schools. Its definition always covers depictions of sexual behaviour and organs, but the amount of material this extends to, is disputed.¹⁰¹ “Pornography names an argument, not a thing”.¹⁰²

⁹⁶ Hainsworth, P. (ed.) *The Politics of the Extreme Right – from the Margins to the Mainstream*. London: Pinter, (2000), p. 11.

⁹⁷ Lehman, P. (ed.) *Pornography – Film and Culture*. London: Rutgers University Press, (2006), p. 5.

⁹⁸ Paasonen, S. Nikunen, K. & Saarenmaa, L. (eds.) *Pornification – Sex and Sexuality in Media Culture*. Oxford: BERG, (2007), p. 1.

⁹⁹ It is important to note that, similarly to the case of the extreme right, it is accepted in this project that different terms other than pornography are used by authors to refer to what is being described here as pornography.

¹⁰⁰ www.oed.com (accessed on 28/04/2008).

¹⁰¹ Wolfson, N. *Hate Speech, Sex Speech, Free Speech*. London: Praeger, (1997), pp. 106-107.

¹⁰² Hunt, L. (ed.) *The Invention of Pornography – Obscenity and the Origins of Modernity, 1500-1800*. New York: Zone Books, (1993), p. 13.

Conventional Definitions of Pornography

The history of the word pornography has often been traced in an attempt to deal with the two main fields of contention regarding definition, the concept and the extension of the concept. The word pornography derives from the ancient Greek *porne* (πόρνη), meaning “whore, specifically and exclusively the lowest class of whore, which in ancient Greece was the brothel slut available to all male citizens. A sexual slave”.¹⁰³ This root origin carried through to the first use of the word in the English language when it was used to describe “the lives, manners, etc, of prostitutes and their patrons”.¹⁰⁴ The Greek definition, though, does not define what is meant by pornography in Western society today; that is not to say that the root origin of the word should be ignored, or that it has not influenced or shaped what pornography is today.

The shared conception of pornography is that it covers depictions of sexual behaviour and organs. However, not all depictions of sexual behaviour and organs are regarded as pornographic; biological depictions, for example, are not regarded as pornography.¹⁰⁵ The issue is, what makes certain depictions of sexual behaviour and organs pornographic? For some, the differentiation between pornographic and non-pornographic depictions of sexual behaviour and organs is simple, pornography is material which has “the power or be intended to act as an aphrodisiac – that is, to excite sexual passions or desires”.¹⁰⁶ Others, though, believe that what differentiates depictions that are perceived as pornographic from those which are not, is a moral background to the conception, a link with the obscene, a pre-conceived idea of what is morally correct;¹⁰⁷ that a pornographic depiction is an obscene depiction. This linking with the obscene, though, leads to a conceptual problem. The obscene is generally regarded as an arbitrary and

¹⁰³ Dworkin, A. *Pornography – Men Possessing Women*. London: The Women’s Press Ltd., (1984), p. 199.

¹⁰⁴ Copp, D. & Wendell, S. *Pornography and Censorship*. New York: Prometheus Books, (1983) p. 17.

¹⁰⁵ Ibid.

¹⁰⁶ Montgomery Hyde, H. *A History of Pornography*. London: A Four Square Book, (1966), p. 2.

¹⁰⁷ Copp, D. & Wendell, S. *Pornography and Censorship*. New York: Prometheus Books, (1983) p. 20.

subjective concept. It is due to this morally subjective assessment of what is or is not pornographic that some argue liberal theorists are so opposed to its restriction.¹⁰⁸

The modern idea of pornography arose in Europe after the 1500s. However, it did not become a separate category of written and visual representation until the early nineteenth century; the word first appearing in the *Oxford English Dictionary* in 1857.¹⁰⁹ From the 1500s until the French Revolution of 1789, pornography was mostly used to criticise the religious and political ruling classes, satirical sexual depictions causing great humiliation to those at whom they were targeted.¹¹⁰ Although initially a luxury for the upper classes, the advent of the printing press and mass literacy soon broadened its reach. “The French Revolution marked an end to the use of pornography as a political vehicle for attacks on the regime. Political success seemed to free pornography for its modern use as a purely sexual vehicle”.¹¹¹ With this shift in the usage of pornography came legal definitions and classifications, and the call for restrictions began.

The various legal definitions of pornography are exemplified by three government commissions set up to deal with pornographic material; two of them in the United States and one in the United Kingdom. The first of these was the *Johnson Commission* (U.S. President’s Commission on Obscenity and Pornography), established in 1968. For this Commission, pornography and obscenity were often interchangeable terms, with pornography not being specifically defined throughout the Commission’s report.¹¹² The second, was the *Williams Committee* (Home Office Departmental Committee on Obscenity and Film Censorship), established in 1977. The Committee defined pornography as:

A book, verse, painting, photograph, film or some such thing – what in general may be called a representation...We take it that as almost everyone understands the term, a pornographic representation is one that combines two features: it has a function or intention, to arouse its audience sexually, and also

¹⁰⁸ Wolfson, N. *Hate Speech, Sex Speech, Free Speech*. London: Praeger, (1997), p. 108.

¹⁰⁹ Hunt, L. (ed.) *The Invention of Pornography – Obscenity and the Origins of Modernity, 1500-1800*. New York: Zone Books, (1993), pp. 9-10.

¹¹⁰ *Ibid.* p. 10.

¹¹¹ Wolfson, N. *Hate Speech, Sex Speech, Free Speech*. London: Praeger, (1997), p. 120.

¹¹² Hawkins, G. & Zimring, F.E.Z. *Pornography in a Free Society*. Cambridge: Cambridge University Press, (1999), p. 21.

a certain content, explicit representations of sexual material (organs, postures, activities, etc.). A work has to have both this function and this content to be a piece of pornography.¹¹³

The third was the *Meese Commission* (U.S. Attorney General Commission on Pornography), established in 1985. *Meese* attempted to limit the use of the term pornography, arguing that in a contemporary context this was associated with negative connotations linked to moral issues and what is considered obscene.¹¹⁴

From these three reports the links that have been made between pornography and obscenity are clear. Pornography and obscenity, though, are not synonymous; there is much that is considered obscene which is not considered pornographic. It is also clear that limited attention has been paid to developing a concise definition of pornography as a concept. Thus, when regarding the possibility of restrictions being placed upon such speech, the radical feminists may have much to offer; as a clear definition is necessary before one can debate what should or should not be restricted.

Andrea Dworkin and Catharine MacKinnon's Definition of Pornography

Andrea Dworkin and Catharine MacKinnon define pornography as:

The graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (a) women are presented dehumanized as sexual objects, things or commodities; or (b) women are presented as sexual objects who enjoy humiliation or pain; or (c) women are presented as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault; or (d) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (e) women are presented in postures or positions of sexual submission, servility, or display; or (f) women's body parts – including but not limited to vaginas, breasts, or buttocks – are exhibited such that women are reduced to those parts; or (g) women are presented being penetrated by objects or animals; or (h) women are presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual. In this definition the use of men, children or transsexuals in the place of women is also pornography.¹¹⁵

Of particular interest for my project is the fact that from this definition of pornography MacKinnon and Dworkin developed a civil right's ordinance which "conceptualized pornography as active practices of gender

¹¹³ Ibid. p. 22.

¹¹⁴ Ibid. p. 21.

¹¹⁵ Dworkin, A. & MacKinnon, C.A. *Pornography & Civil Rights – A New Day for Women's Equality*. Catharine A. MacKinnon and Andrea Dworkin, (1989), p. 36.

subordination”.¹¹⁶ As a result, they were able to fashion a legal instrument for individuals harmed by pornography to seek legal redress. Not only individual harm, though, is recognised in their ordinance; the effects of harms to women as a class are also acknowledged. Due to the central concern of this project relating to racist hate speech and any possible restrictions upon it within a democratic context, a definition of pornography which recognises group harm and is developed through a legal structure is particularly useful. A legal structure is central to a democratic society and those belonging to a race may also be classified as a group. In addition, Dworkin and MacKinnon’s definition means that pornography is, in fact, classifiable as hate speech. Despite their definition being extensive and comprehensive, in order for it to be understood, it must be placed within the context in which MacKinnon and Dworkin view pornography; within the central concerns they find with pornography, what they see this speech as doing, and the harms they see it as causing, including harms derived from domination.

In developing their definition of pornography, MacKinnon and Dworkin insist pornography is neither a moral issue nor one concerned with obscenity. They regard this feature of their definition as particularly important due to the fact that pornography has generally been tackled in law through obscenity legislation. They suggest that obscenity and morality are linked; arguing, meanwhile, that their critique of pornography is political and thus located within a different sphere. They also argue that whilst obscenity is abstract, pornography is concrete.¹¹⁷ Central to their critique of obscenity legislation is their belief that pornography causes tangible harms and domination that validate restrictions. They accept that obscenity can cause little more than offence, which is generally accepted as insufficient grounds upon which to base restrictions on speech. However, they argue that pornography “causes attitudes and behaviours of violence and discrimination that define the treatment and status of half the population”.¹¹⁸ Another

¹¹⁶ Dines, G. Jensen, R. & Russo, A. *Pornography – The Production and Consumption of Inequality*. New York: Routledge, (1998), p. 13.

¹¹⁷ MacKinnon, C.A. Not a Moral Issue. in Mashchke, K.J. (ed.) *Gender and American Law – Pornography, Sex Work and Hate Speech*. New York: Garland Publishing Inc., (1997), p. 3.

¹¹⁸ Ibid. p. 3.

problem which they find with the placing of pornography regulation within the realm of the obscene is that this belittles the tangible harms which they believe pornography to cause. Moreover, the framework of morality and obscenity within which pornography is placed is constructed from a male perspective, thus, women are disregarded.¹¹⁹ In addition, they argue that the difficulties that have arisen when attempting to differentiate between obscene pornography and great works of literature and art also derive from the placing of pornography within the realm of the obscene.¹²⁰ Through the specificity of their definition they believe this problem will be avoided.¹²¹

The framing of the moral and the obscene from a male perspective means that, in accordance with obscenity legislation, for pornography to be considered obscene it must be sexually arousing; what this translates to, though, is that the material must cause an erection. The equating of sexually arousing with causing an erection is derived from the fact that women were not involved in the legal system when obscenity legislation was first drafted, and the fact that female arousal is harder to ascertain. Thus, “the act that obscenity recognises is erection, and whatever writing produces erection is seen to be obscene – because of what it makes happen”.¹²² Pornography, though, is not regarded by Dworkin and MacKinnon as simply being about erection; rather, they see it as concerning the subjugation of women. This is not to say, though, that the erection is completely removed from their view of pornography. It is in part “the conditioning of erection and orgasm in men to the powerlessness of women”¹²³ that result in the oppression and subjugation of women. This oppression and subjugation, although facilitated and dissipated through pornography, is, according to Dworkin and MacKinnon, only possible due to the inequalities which exist within Western

¹¹⁹ Ibid. p. 8.

¹²⁰ Ibid. p. 10.

¹²¹ MacKinnon and Dworkin’s critique of the placing of pornography within the realm of the obscene will be further discussed in Chapter 2, which deals with the liberal stance on these issues, i.e. predominantly opposing restrictions upon pornographic speech due to the arbitrariness and subjectivity of the obscene and moral.

¹²² Dworkin, A. *Against the Male Flood: Censorship, Pornography and Equality*. in Mashchke, K.J. (ed.) *Gender and American Law – Pornography, Sex Work and Hate Speech*. New York: Garland Publishing Inc., (1997), p. 76.

¹²³ Ibid. p. 78.

societies, the inequalities between men and women. This inequality is, in turn, sexualised through pornography.¹²⁴

There are three principal harms caused by pornography which Dworkin and MacKinnon are particularly concerned with. The first of these is the harm to those involved in the making of pornography; the women who have to be beaten, tied up, whipped, humiliated and so on; women who, generally, come from deprived backgrounds.¹²⁵ Becoming involved in pornography is not necessarily an absolute expression of free will, but, rather, a last resort; with some also being forced to perform in it, a harm which, although recognised by law, in reality is negated by the frequent claims that *they seemed to be enjoying it*.¹²⁶ The second harm which they point to is that caused to women who are forced to watch pornography in order to then re-enact it. The third harm they recognise is that derived from an increase in violent attitudes and crimes towards women as a result of exposure to pornography.¹²⁷ Aspects of domination are present within the three types of harm identified.¹²⁸

Through a development of these harms in their civil rights ordinance, Dworkin and MacKinnon developed ways in which pornography could be restricted. They demanded “that pornography be civilly actionable by its victims as sex discrimination and recognised as a violation of human rights”.¹²⁹ Through this ordinance they define pornography as “a violation of civil rights of women”.¹³⁰ In the development of this ordinance, MacKinnon and Dworkin clearly specify that they are not calling for censorship of all sexually explicit material; they are merely calling for the free speech absolutism which has been applied to the case of pornography, predominantly by those tackling the issue from a liberal perspective, to be

¹²⁴ Ibid. p. 83.

¹²⁵ See: Dworkin, A. *Pornography – Men Possessing Women*. London: The Women’s Press Ltd., (1984); MacKinnon, C.A. *Only Word*. Cambridge: Harvard University Press, (1993).

¹²⁶ MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993), p. 20.

¹²⁷ MacKinnon, C.A. *Women’s Lives – Men’s Laws*. London: Harvard University Press, (2005), p. 303.

¹²⁸ These harms and their link to domination, alongside critiques of their extent, will be further examined in Chapter 4.

¹²⁹ MacKinnon, C.A. *Women’s Lives – Men’s Laws*. London: Harvard University Press, (2005), p. 301.

¹³⁰ MacKinnon, C.A. & Dworkin, A. (eds.) *In Harm’s Way – The Pornography Civil Rights Hearings*. London: Harvard University Press, (1997), p. 40.

readdressed. They wish for those who have been victims of pornography to be able to hold pornography legally responsible.¹³¹ “It is not a ban, unless relief for a proven injury is a *ban* on doing that injury again”.¹³² The ordinance stipulates five possibilities for finding pornography accountable, five possibilities for legal prosecution: coercion into pornography; having pornography forced on you; being assaulted because of particular pornography; defamation through pornography; and trafficking in pornography.¹³³ Despite much of this already being illegal, they argue that there remains a need for their ordinance,¹³⁴ because they believe that existing legislation is not applied in a meaningful way which recognises the harms caused to women.¹³⁵

Surrounding the harms of pornography are issues of submission and the domination of women. The radical feminists argue that “the sexual ideology of patriarchy eroticizes domination and submission”;¹³⁶ pornography is regarded by them as one of the main vehicles through which these patriarchal values are dissipated throughout society. Of particular concern is the fact that submission and domination are made sexual, sexuality and sexual drive are particularly powerful modes of control. This sexualisation of submission and domination, in turn, they argue, objectifies women and normalises sexual violence against them. Through this objectification, women’s development of a sense of self is hindered; in such instances women are *othered*, they are left in a position whereby they are the zero to man’s one, they are not a subject but an object.¹³⁷ Through this *othering*, women are deprived of full participation in society and thus kept in

¹³¹ MacKinnon, C.A. *Women’s Lives – Men’s Laws*. London: Harvard University Press, (2005), p. 305.

¹³² MacKinnon, C.A. *Feminism Unmodified – Discourses in Life and Law*. London: Harvard University Press, (1987), p. 177.

¹³³ Dworkin, A. & MacKinnon, C.A. *Pornography & Civil Rights – A New Day for Women’s Equality*, Catharine A. MacKinnon and Andrea Dworkin, (1989), p. 41.

¹³⁴ MacKinnon, C.A. *Women’s Lives – Men’s Laws*. London: Harvard University Press, (2005), p. 305.

¹³⁵ The civil rights ordinance will be further discussed in Chapter 4.

¹³⁶ Dines, G. Jensen, R. & Russo, A. *Pornography – The Production and Consumption of Inequality*. New York: Routledge, (1998), p. 2.

¹³⁷ For examples of theorists talking of women as other, zero or in a state of becoming see: Irigaray, L. *An Ethics of Sexual Difference*. London: Continuum, (2004); Irigaray, L. *This Sex Which is Not One*. New York: Cornell University Press, (1985); De Beauvoir S. *Le Deuxieme Sexe*. Paris: Galimard, (1984).

subordinate roles; leading to the silencing of women, as women are not given a voice that is recognised or valued in society. The harms related to the normalisation of sexual violence against women relate to the acceptance, increase and lack of recognition of such crimes, whereby “the violence against women is then denied and passed off as ‘normal’ sexual relations”.¹³⁸

Language is central to Dworkin and MacKinnon’s definition of pornography, as it is through language that man dominates women in society; it is through language that women are silenced.¹³⁹ Furthermore, they argue that the silencing results in the harms that take place becoming acceptable and invisible. Through this invisibility, the harms are not recognised, leaving the women harmed by pornography unsure as to whether the abuse took place; it being generally accepted that we need recognition from others in order to truly recognise our selves.¹⁴⁰ This distorts women’s relationship with not only speech but also the law and society in general.¹⁴¹ Intrinsic to this understanding of pornography as silencing is the role that performative speech theories play in Dworkin and MacKinnon’s conception. In accordance with performative speech theories,¹⁴² speech can be considered an act. Dworkin and MacKinnon regard pornography as “sexual abuse as speech”.¹⁴³ Without recognition of the potency of performative speech acts, Dworkin and MacKinnon concede that pornography could do little more than offend. The alleged potency of performative speech acts, though, has been criticised by some in the liberal camp. Republican theory, meanwhile, carves out a role for performative speech through its development of theories on the birth of the citizen in the public sphere.¹⁴⁴

¹³⁸ Dines, G. Jensen, R. & Russo, A. *Pornography – The Production and Consumption of Inequality*. New York: Routledge, (1998), p. 11.

¹³⁹ Wolfson, N. *Hate Speech, Sex Speech, Free Speech*. London: Praeger, (1997), p. 122.

¹⁴⁰ Hegel, G.W.F. *Hegel’s Phenomenology of Spirit*. Pennsylvania: Pennsylvania State University Press, (1994).

¹⁴¹ MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993), pp. 1-7.

¹⁴² For examples of performative speech theories see: Austin, J.L. *How to do Things with Words*. Oxford: Clarendon Press, (1975); Butler, J. *Excitable Speech*. New York: Routledge, (1997).

¹⁴³ MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993), p. 9.

¹⁴⁴ The role of performative speech from a liberal and republican perspective will be discussed in Chapters 2 and 3 respectively.

Despite liberal theorists questioning the potency of performative speech acts, MacKinnon points out that the law recognise certain words for what they 'do': *I do* at a wedding, *not guilty* as a jury verdict or *ready, aim, fire* at an execution. Not only are such performative speech acts recognised by law, they are also treated differently by freedom of speech theory; as MacKinnon points out, "nobody takes an appeal of a guilty verdict as censorship of the jury".¹⁴⁵ The law itself is *only words*, its power is derived from the support given to it by the state's power; pornography is *only words*, its power is derived from the inequalities between men and women in society.¹⁴⁶

In addition to the fact that performative speech acts are present within Western legal systems, MacKinnon also points to the role that they play in segregation. It is through words that social inequalities are created; "segregation cannot happen without someone saying *get out* or *you don't belong here* at some point".¹⁴⁷ This key role that words play in segregation, MacKinnon suggests, is also recognised in Western legal systems; words such as *sleep with me* or *you are fired*, in the instance of an employer speaking to an employee, are accepted as discriminatory acts. Hence, MacKinnon and Dworkin wonder why pornography should be treated exclusively as an expression of ideas. "There are many ways to say what pornography says, in the sense of its content. But nothing else does what pornography does".¹⁴⁸ It is not the ideas behind pornography that harm people, it is pornography; those who consume pornography are not consuming the ideas, they are consuming pornography. The message behind pornography is the subjugation and domination of women, this is not a unique message; rather, it is the way that this message is dissipated through pornography, through the erection, that makes it unique.¹⁴⁹

¹⁴⁵ MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993), p. 13.

¹⁴⁶ *Ibid.* p. 40.

¹⁴⁷ *Ibid.* p. 13.

¹⁴⁸ *Ibid.* pp. 14-15.

¹⁴⁹ *Ibid.* p. 21.

Distinctive Features of the Dworkin-MacKinnon Definition

There are seven elements which distinguish Dworkin and MacKinnon's definition of pornography when compared against conventional definitions.¹⁵⁰

These elements are:

- 1) The link to obscenity:** Perhaps the most obvious distinction between the Dworkin and MacKinnon definition of pornography is the removal of a link with obscenity. Whilst the conventional definitions refer to the obscene, at times even using the terms obscene and pornographic as interchangeable, Dworkin and MacKinnon are clear that they do not believe pornography should be linked to the obscene. Moreover, they specifically ask for a removal of the links between the pornographic and the obscene due to the arbitrariness of the obscene as a concept.
- 2) The harm caused:** Due to the linking of pornography with the obscene, the harm which is derived from pornography has often been limited to offence. Dworkin and MacKinnon themselves accept that offence is the most the obscene can cause. However, due to their removal of the link with the obscene, they identify tangible harms which are caused by pornography, including harm derived from domination.
- 3) The role of the erection:** According to the definitions which are linked to the obscene, for material to be considered pornographic it must be sexually arousing, with sexually arousing equating to causing an erection. Dworkin and MacKinnon, though, see the role of the erection as entirely different from this; they argue that pornography trains the erection to the submission, domination and subjugation of women.
- 4) Pornography as civil rights abuse:** MacKinnon and Dworkin see pornography as limiting women's civil rights. They regard pornography as leading to silencing, oppression, subjugation, violence and so on. The view which links pornography to the obscene, though, can only be extended to recognise pornography as causing offence.

¹⁵⁰ These features are not only identifiable through an analysis of their definition and the others, but also due to the fact that they make conscious efforts throughout their works to identify the ways in which their definition is different. They often point to what their definition is not.

- 5) Pornography as a performative speech act:** Dworkin and MacKinnon are concerned with what pornography does as opposed to what it says. They regard pornography as a performative speech act and thus develop their arguments relating to the tangible harms caused by pornography. Performative speech acts are not readily accepted by liberal theorists. Moreover, those who argue for free pornographic speech regard it merely as the expression of ideas.
- 6) Women's perspective:** Whilst Dworkin and MacKinnon make constant references to women's perspective with regard to pornography; out of the three reports mentioned in the previous section only one, *The Meese Commission*, mentions women's perspective, with the mention appearing in a footnote.¹⁵¹
- 7) Pornography as hate speech:** Perhaps the most important distinction for this project, is the fact that MacKinnon and Dworkin, unlike the conventional definitions, regard pornography as a form of hate speech.¹⁵² Due to its importance, this feature will be developed upon in the next section.

As mentioned in the section assessing conventional definitions of pornography, the only unifying classification which seems to appear in all definitions of pornography is that the material must include depictions of sexual organs or depictions of sexual behaviour. This feature remains the only classification which links the Dworkin and MacKinnon definition to the conventional definitions. This element, though, is of little use when regarding the scope of pornography as a concept and considering possible restrictions upon it. Thus, regarding the Dworkin and MacKinnon definition, it is the features that distinguish it from the conventional definitions of pornography which are of interest in this project.

¹⁵¹ Hawkins, G. & Zimring, F.E.Z. *Pornography in a Free Society*. Cambridge: Cambridge University Press, (1999), p. 152.

¹⁵² MacKinnon makes references to pornography as hate speech throughout her works on pornography. Examples of this will be given in this chapter in the section looking at the similarities and differences between pornography and racist hate speech.

Pornography as Hate Speech

Numerous feminists, including Dworkin and MacKinnon,¹⁵³ consider pornography to be hate literature.¹⁵⁴ Central to this conception of pornography as hate literature or hate speech are their definition of pornography and their definition of hate speech, including what they see hate speech as doing. At the core of what they see hate speech as doing, is that such speech seeks to portray its victims as inferior, through a focus on difference, in an attempt to maintain them in a subordinate position.¹⁵⁵

Dworkin and MacKinnon have the same concerns regarding hate speech as they do regarding pornography, hence their classification of pornography as hate speech. Certain elements of pornography which they see as resulting in harms they see replicated in other forms of hate speech. “Both pornography and hate literature are hateful; both propagate insidious group stereotypes; both promote and often instigate violence; both dehumanize”.¹⁵⁶ In addition, they also argue that hate speech, like pornography, is a performative speech act. “Hate speech and pornography do the same thing: enact the abuse”.¹⁵⁷

Despite a concern with hate speech and a clear classification of pornography within this realm, Dworkin and MacKinnon do not develop a clear definition of hate speech. Due to their focus on pornography, it is pornography which they concentrate on clearly defining. Despite this focus though, it must be noted that they are very clear when classifying pornography as hate speech. Due to the lack of a clear definition of hate speech in the radical feminist literature, the definition provided by CRT will be explored. The rationale behind using CRT for this task lies in the fact that radical feminism, alongside critical legal theory, was the theoretical school from which critical race theorists developed their main tenets; building on the

¹⁵³ “Pornography is hate speech” MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993), p. 23.

¹⁵⁴ Copp, D. & Wendell, S. *Pornography and Censorship*. New York: Prometheus Books, (1983), p. 52.

¹⁵⁵ Ibid.

¹⁵⁶ MacKinnon, C.A. *Women’s Lives – Men’s Laws*. London: Harvard University Press, (2005), p. 317.

¹⁵⁷ MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993), p. 164.

insights of the radical feminists into power, domination and entrenched hierarchies.¹⁵⁸ As a result of this theoretical proximity, there are numerous similarities between CRT and radical feminism. Amongst these similarities are an activist element within the movement, a critique of liberalism, theories of performative speech and a focus on domination and harms caused through speech. Not only have the critical race theorists and radical feminists, including Dworkin and MacKinnon, collaborated on numerous works; they also both call for restrictions upon pornography and racist hate speech.¹⁵⁹

1.3 Defining Racist Hate Speech

The term *hate speech* first came into use in the 1980s, it was previously referred to as *race hate* and *group libel*.¹⁶⁰ Similar to pornography, racist hate speech has proven difficult to define. Definitions of racist hate speech have tended to be extremely broad; making their use for legal restrictions upon this form of speech limited.

Conventional Definitions of Hate Speech

Hate speech is defined by Human Rights Watch as “any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities, and to women”.¹⁶¹ It has also been defined as an “expression which is abusive, insulting, intimidating, harassing, and/or which incites to violence, hatred or discrimination”;¹⁶² “a genesis term that has come to embrace the use of speech attacks based on race, ethnicity, religion, and sexual orientation or preference”;¹⁶³ and as “generally reserved

¹⁵⁸ Delgade, R. & Stefancic, J. *Critical Race Theory – An Introduction*. New York: New York University Press, (2001), p.5.

¹⁵⁹ For an example of collaboration between critical race theory and radical feminism see Lederer, L. & Delgado, R. (eds.) *The Price We Pay – The Case Against Racist Hate Speech, Hate Propaganda and Pornography*. New York: Hill and Wang, (1995).

¹⁶⁰ Whillock, R.K. & Slayden, D. *Hate Speech*. London: SAGE Publications, (1995), p. 268.

¹⁶¹ Walker, S. *Hate Speech – The History of an American Controversy*. Lincoln: University of Nebraska Press, (1994), p. 8.

¹⁶² Colive, S. (ed.) *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*. Article 19. International Centre Against Censorship. Human Rights Centre, Essex, University of Essex, (1992), p. v.

¹⁶³ Smolla, R.A. *Free Speech in an Open Society*. New York: Alfred A Knopf, (1992), p. 15.

for verbal attacks that target people on the basis of their immutable characteristics”.¹⁶⁴

From these definitions, two points are of interest. Firstly, the reference to offence. As was the case with pornography, liberal theory has labelled speech which falls within this category as offensive, thereby placing it within the realm of the moral. Secondly, it is interesting to note that despite all of these definitions including verbal attacks based on people’s immutable characteristics, there is not much specificity as to what these attacks include or consist of. Thus, the problem of definition, as was the case with pornography, is one of content and extent of the concept. It is also important to note that although race and therefore racist hate speech fall within these definitions of hate speech; no specific distinguishing features are developed as far as a definition of racist hate speech is concerned in these instances. It is merely a subcategory of hate speech.

Critical Race Theory Definition of Racist Hate Speech

CRT regards hate speech as “a mechanism to separate people and to create hierarchies based on race, sex, religion, and sexual orientation”.¹⁶⁵ Due to its central concern being with the race element of hate speech, it is racist hate speech that it concentrates on defining and assessing. The critical race theorists whose definitions of racist hate speech I focus on are Mari Matsuda and Richard Delgado, partly due to the clarity of their definitions but also because they have sought to develop a theory of legal redress for harms caused by racist hate speech; similar to Dworkin and MacKinnon’s civil rights ordinance. Moreover, Richard Delgado is regarded as being at the forefront of the debate over the legal regulation of hate speech.¹⁶⁶

Matsuda is clear to point out that a definition of legally actionable racist hate speech must be narrow in order for it to be applicable and avoid liberalism’s *slippery slope* arguments. She identifies three characteristics

¹⁶⁴ Gould, J.B. *Speak no Evil – The Triumph of Hate Speech Regulation*. Chicago: The University of Chicago Press, (2005), p. 14.

¹⁶⁵ Lederer, L. & Delgado, R. (eds.) *The Price We Pay – The Case Against Racist Hate Speech, Hate Propaganda and Pornography*. New York: Hill and Wang, (1995), p. 131.

¹⁶⁶ Wing, A.K. & Stefanic, J. *The law Unbound! A Richard Delgado Reader*. London: Paradigm Publishers, (2007).

which racist hate speech must demonstrate in order for it to fall within this category. These are:

- 1) "The message is of racial inferiority".
- 2) "The message is directed against a historically oppressed group".
- 3) "The message is persecutory, hateful and degrading".¹⁶⁷

Also arguing for a narrow definition of racist hate speech which may be legally actionable, Delgado states that:

Not every reference to a person's race or color is insulting, nor is every insult addressed to a minority person a racial insult. The cause of action suggested here is limited to language intended to demean by reference to race, and which a reasonable person would recognise as a racial insult.¹⁶⁸

His proposed tort action for dealing with racist hate speech, suggests that the plaintiff be required to prove that:

Language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognise as a racial insult.¹⁶⁹

Behind these definitions as to what is to be included in legally actionable racist hate speech is a concern with the harms which critical race theorists believe such speech to cause. The concerns over harms caused by racist hate speech, they argue, are exacerbated by the fact that membership of a race is neither self-inflicted nor alterable.¹⁷⁰ A predominant harm which Delgado focuses on is the psychological harm caused to the victims of racist hate speech. Due to critical race theorists believing that racism and racist hate speech are ordinary occurrences, as opposed to isolated acts, they believe that the victims can internalise the insults, believing them to be true; which, in turn, leads to self-doubt and self-hatred.¹⁷¹ Such psychological harms limit the life chances of the individuals whom they affect, as they fail to pursue a number of opportunities available to them due to a lack of confidence; thereby perpetuating the position of racial minorities as a social and economic underclass which is subordinated and domination by the racial

¹⁶⁷ Matsuda, M.J. Lawrence, C.R. III. Delgado, R. & Williams Crenshaw, K. *Words that Wound – Critical Race Theory, Assaultive Speech and the First Amendment*. Boulder: Westview Press, (1993), p. 36.

¹⁶⁸ Ibid. p. 104.

¹⁶⁹ Ibid. p. 109.

¹⁷⁰ Ibid. p. 90.

¹⁷¹ Delgado, R. & Stefancic, J. *Critical Race Theory – An Introduction*. New York: New York University Press, (2001), p. 7.

majority.¹⁷² Such harms result in racist hate speech producing a similar form of domination to that produced by pornography.

Despite the frequency of incidents of racist hate speech, critical race theorists argue, its victims are unaware of the fact that others suffer in a similar way to them. This lack of recognition is partly derived from the shame which they are made to feel through the hate speech and their unwillingness to discuss such matters with others. Isolating the victims from others, particularly others belonging to the dominant racial group, and forcing them to suffer in silence. Critical race theorists argue that through an exposure of the frequency of racist hate speech they will be able to alleviate this particular problem.¹⁷³ Through this exposure, they also hope to tackle another prominent concern which they have with racist hate speech, the fact that it silences its victims. Due to the subordinate and inferior image of racial minorities which is dissipated through racist hate speech, the speech of members of these minorities is not only undermined but also often excluded from the deliberative arena altogether. Racist hate speech distorts the marketplace of ideas and so does not allow its victims an equal position from which to counter-deliberate.¹⁷⁴ Redressing this inability to counter-deliberate is of particular importance to critical race theorists as they believe that without a context of oppression and inequality, a context that would be challenged by the newly gained voices of racial minorities, racist hate speech has no power.¹⁷⁵

Another method of tackling the silencing power of racist hate speech which critical race theorists point to is the *victims' story*. There is a strong focus on alternative modes of writing and on 'bottom up' historical approaches. Through these approaches, critical race theorists believe that racial minorities, who in their opinion have been oppressed in Western

¹⁷² Matsuda, M.J. Lawrence, C.R. III. Delgado, R. & Williams Crenshaw, K. *Words that Wound – Critical Race Theory, Assaultive Speech and the First Amendment*. Boulder: Westview Press, (1993), p. 91-93.

¹⁷³ Ibid. p. 13.

¹⁷⁴ Delgado, R. Towards a Legal Realist View of the First Amendment. *Harvard Law Review*. Vol. 113, No. 3, (Jan., 2000), p. 791.

¹⁷⁵ Matsuda, M.J. Lawrence, C.R. III. Delgado, R. & Williams Crenshaw, K. *Words that Wound – Critical Race Theory, Assaultive Speech and the First Amendment*. Boulder: Westview Press, (1993), p. 8.

societies, will have new modes of communication at their disposal. Critical race theorists are also concerned by the fact that the shaping of the communicative system has been dictated by the white majority. Thus, modes of communication which ethnic minorities sometimes use, such as storytelling, are disregarded.¹⁷⁶

Alongside the context of oppression, domination and inequality, critical race theorists argue that racist hate speech gains its power from a history of violence. The victims of racist hate speech are extremely aware of a history of violence against their people; a violence which is not as far in the past as most would like to believe. Thus, there is an acceptance within racial minority communities that where there is racist hate speech, there may soon be violence.¹⁷⁷ It is from this history of violence that racist hate speech has gained its potency as a performative speech act; it is through this performative nature that the speech has become abuse. Adding to the history of violence, racist hate speech's ability to construct a social reality and impose it upon its victims through invisible channels is also a characteristic of it as a performative speech act.¹⁷⁸

Although CRT has not focused on the racist hate speech of political organisations, the theory may be applied to them. The rationale behind this theoretical application partly lies in the core concern in both instances being with racist hate speech, but also in CRT's acknowledgement that the harms caused by racist hate speech are exacerbated in instances of the speech being delivered in front of others or by a person of authority.¹⁷⁹ In the instance of the speech being that of a political organisation, the speech is delivered by a person of authority but also, often, in front of others.¹⁸⁰

¹⁷⁶ Delgado, R. & Stefancic J. *Critical Race Theory – An Introduction*. New York: New York University Press, (2001), pp. 39 – 43.

¹⁷⁷ Matsuda, M.J. Lawrence, C.R. III. Delgado, R. & Williams Crenshaw, K. *Words that Wound – Critical Race Theory, Assaultive Speech and the First Amendment*. Boulder: Westview Press, (1993), p. 24.

¹⁷⁸ *Ibid.* p. 61.

¹⁷⁹ *Ibid.* p. 94.

¹⁸⁰ The application of this theory for the case of extreme right political organisations' racist hate speech will be further discussed in Chapter 4. The harms which critical race theory believes racist hate speech to cause will also be further discussed in Chapter 4. The critical race theory critique of liberalism, meanwhile, will be further discussed in Chapter 2.

Distinctive Features of the Critical Race Theory Definition of Racist Hate Speech

The CRT definition of hate speech is perhaps unrecognisable from those provided by others. However, the fact that they have developed a definition of racist hate speech beyond hate speech as a general term is, in itself, a distinguishing feature. In addition, the absence of references to offence and the moral realm in the CRT definition also help distinguish it from others.¹⁸¹

Matsuda and Delgado aim to develop a definition which is sufficiently narrow for it to be legitimately used as a guideline for the legal redress of the harms they believe hate speech to cause. Thus, unlike the other definitions of hate speech which are broad and unspecific, the Delgado and Matsuda definitions provide limits to the concept of racist hate speech. As a result, much of what would be considered racist hate speech by other definitions would not fall within the realm of what Matsuda or Delgado regard as legally actionable racist hate speech. The central concern with harms caused by this speech as well as the development of theories of performative speech acts in order to explain the potency of the speech are also distinctive features of the CRT definition. Through this narrowness, Delgado and Matsuda avoid many of the criticisms aimed at restrictions upon racist hate speech which are derived not only from liberal but also from republican theory.¹⁸²

1.4 Similarities: Pornography and Racist Hate Speech

The main similarities between pornography and racist speech identified here are:

- 1) Focus on harm:** From a radical feminist and CRT perspective, the main concern with both racist hate speech and pornography is the harm caused by these forms of speech. It is argued that both cause sufficient tangible harm for restrictions to be made upon such speech in accordance with a liberal *harm principle*. Although there are specific harms for each case which are not present in the other, there are also

¹⁸¹ This point will be further discussed in Chapter 2, as it is generally liberal definitions which tend to place hate speech within the realm of the moral.

¹⁸² This curbing of criticisms will be further discussed in Chapters 2 and 3 respectively.

several similarities in the harms caused. The harms caused are both underpinned by domination, subordination and subjugation of the targets of the speech, with this having harmful psychological and de-humanising effects.

2) Concern with power and domination: A principal concern with both these forms of speech is that due to already existing social inequalities, the victims of the speech are further dominated by the dissipation of messages of inferiority in the speech. This message of inequality, in turn, exacerbates the inferior positions of the victims of this speech and leaves them in an unfavourable position in society; denying them certain socio-political opportunities which are open to their verbal attackers.¹⁸³ A concern with domination underpins the argument being made in this thesis that the radical feminist and CRT perspectives are better aligned to a republican conception of freedom as non-domination, as opposed to a liberal conception of freedom. Although, as noted in the point above, the main concern with both racist hate speech and pornography is the harm caused by these forms of speech, I argue that these are harms derived from oppression and domination; with this going beyond how the radical feminists themselves present the issue.

3) Silencing speech: Both pornography and racist hate speech are regarded as silencing their victims; undermining them to an extent that their speech loses validity; not allowing them grounds upon which to exercise their speech. Messages of inferiority are again central to this process. In addition, it is argued that counter speech solutions, such as responding to the verbal attack with more speech or rationally countering the attack, are not enough to counter this silencing; due to the power imbalance between those uttering the speech and its victims and due to a fear of physical retribution in the instance of counter speaking. This silencing further harms its victims by making acts against them invisible in the eyes of the broader society and

¹⁸³ For an example of these issues in critical race theory regarding both hate speech and pornography refer to: Cortese, A. *Opposing Hate Speech*. London: Praeger, (2006), pp. 77-101.

causing them to suffer in silence due to a belief that they are alone in experiencing such abuses.¹⁸⁴

- 4) The use of violence:** Both pornography and racist hate speech rely on a history of violence against their victims in order to diminish the opportunities which they would have to counter deliberate when being verbally attacked. In addition, this history of violence and representations of violence in the speech increases the harm caused by the speech. The frequency and protection of both these forms of speech also results in the violence against them being regarded, to some degree, as normal.
- 5) Performative speech:** The concern with both pornography and racist hate speech is not with what the speech says but what the speech does. Both these forms of speech are regarded as performative speech acts causing tangible harm to their victims. The power of this performative speech is increased by the history and use of violence in the speech as well as for the purposes of segregation. The performative nature of these forms of speech also results in them constructing a social reality, making it extremely difficult for their victims to then challenge this reality.¹⁸⁵
- 6) Injury to individuals as members of a group:** Despite these forms of speech being aimed at groups, harm is caused to the members of these groups as individuals. This harm is further exacerbated by the fact that these individuals are attacked on the grounds of something which they can neither change nor choose, race and gender.¹⁸⁶
- 7) Similarities in the approaches:** Besides the similarities listed above there are also similarities between the radical feminist and CRT approaches on how to tackle such speech. These include a focus on

¹⁸⁴ For an example of these issues in critical race theory regarding both hate speech and pornography refer to: Lederer, L. & Delgado, R. (eds.) *The Price We Pay – The Case Against Racist Hate Speech, Hate Propaganda and Pornography*. New York: Hill and Wang, (1995), p. 324.

¹⁸⁵ For an example of these issues in radical feminism regarding both hate speech and pornography refer to: MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993), pp. 22-23.

¹⁸⁶ For an example of these issues in radical feminism regarding both hate speech and pornography refer to: MacKinnon, C.A. *Feminism Unmodified – Discourses in Life and Law*. London: Harvard University Press, (1987), p. 167.

the victims' story as a way of tackling silencing;¹⁸⁷ a challenge to the liberal conception of the private and public spheres, due to many of the harms caused by these forms of speech occurring in the private sphere; and a call for legal restrictions upon narrow definitions of these forms of speech.

1.5 Differences: Pornography and Racist Hate Speech

Despite these similarities, there are also differences between pornography and racist hate speech. These differences, however, although important to note, do not invalidate the application of the anti-pornography approach to the case of extreme right political organisations' racist hate speech. Moreover, some of these differences can be overcome.

1) Concern over harm to people in the production of pornography:

A major concern of the radical feminists is with the harm caused to women in the production of pornography; with the fact that real women have to be harmed in order for the photographic and video images to be produced. Despite the fact that there is no equivalent in racist hate speech, this concern can be overcome. The fact that the performative power of racist hate speech is exacerbated by its history of violence, which included physical harm being done to real people, is a parallel concern.

2) Pornography being an industry: Pornography is produced by a mass industry; it is dissipated through shops, cinemas, the Internet, etc. Racist hate speech is not produced by an industry. Despite this difference, though, the focus in this thesis on the racist hate speech of political organisations goes some ways towards overcoming this difference. A concern with the racist hate speech of political organisations is different from the predominant concern over individual racist hate speech attacks, the main focus of CRT.¹⁸⁸

¹⁸⁷ For an example of the radical feminist use of this refer to: Lovelace, L. *Ordeal*. London: Citadel Press, (1980).

¹⁸⁸ This difference will be further discussed in Chapter 4.

3) Pornography as sexualising inequality: Another mayor concern the radical feminists have with pornography centres around the fact that they believe it sexualises inequalities between men and women; they argue that sexualisation is a particularly powerful mode through which to exacerbate inequalities.¹⁸⁹ A clear parallel between the two forms of speech is not apparent here. However, a single differentiating factor does not make the radical feminist model invalid for the case of far right political organisations' racist hate speech.¹⁹⁰

1.6 Defining Alignment

As was the case when exploring the definitions of pornography and racist hate speech, the definition of alignment requires more than an assessment of the ordinary linguistic use of the word. Alignment is being used in this thesis to designate a way of relating radical feminism to republicanism, liberalism to the Spanish Constitution, and republicanism to the Finnish Constitution. The type of alignment being suggested here can be contrasted with a causal relationship, on the one hand, and elective affinity, on the other. In a causal relationship, A leads to B because B is dependent on A. In elective affinity, A promotes or facilitates B, leading to a merging of the two, AB. Both these kinds of relationships, despite one suggesting a causal and one a non-causal relationship, refer to actual, empirical relationships. By contrast, what I call alignment refers to a relationship that exists for the investigator but not necessarily for the actors concerned. These three different sorts of relationship will now be outlined in turn in order to point up the contrasts between them and so further underline what is and what is not being claimed when aligning different theories, policies and constitutional traditions in the way proposed by this thesis.

¹⁸⁹ MacKinnon, C.A. *Women's Lives – Men's Laws*. London: Harvard University Press, (2005), p. 317.

¹⁹⁰ This will be further discussed in Chapter 4, with a focus on sexism and racism as “inter-locking systems of domination that maintain each other”. Lederer, L. & Delgado, R. (eds.) *The Price We Pay – The Case Against Racist Hate Speech, Hate Propaganda and Pornography*. New York: Hill and Wang, (1995), p. 94.

Causal Relationships

Causal relationships provide an explanation of a given phenomenon. They are often seen as a central goal of research in the social sciences¹⁹¹ and can be defined as: “if X happens then Y will follow as a result”.¹⁹² The phenomenon that is being explained is termed the dependent variable, so named as it is perceived as the result of the other factors, in turn referred to as independent variables as they are not “taken as determined by anything in particular”.¹⁹³ It is important to note that no variable is inherently either dependent or independent; rather, their labelling varies with regard to the role they play in the causal theory.¹⁹⁴ It is also important to emphasise that two phenomena coinciding does not mean that causality can necessarily be claimed; one of the phenomenon must produce the other.¹⁹⁵ In social science research methods it is generally accepted that the causal claim can be established through empirical analysis of observational data, be it via a statistical method or a comparative method. This analysis results in the hypothesis relating the dependent or the independent variable being tested.¹⁹⁶

The causality model briefly explained above is a method that is derived from a wide range of philosophical discourse. Hume argued that despite us believing that all events had causes, that there was no valid reason for this conclusion. He concluded, instead, that it was experience and habit that resulted in us claiming causality. Because we have experienced something happening we expect it to happen again under similar circumstances; he believed, though, that there was no guarantee that things would actually happen again merely because they had happened before. The concept of cause and effect itself is not doubted by Hume but rather the

¹⁹¹ Freedman, D. A. *Statistical Models and Causal Inference - A Dialogue with the Social Sciences*. Cambridge: Cambridge University Press, (2010), p. xiii.

¹⁹² Phillips Shively, W. *The Craft of Political Research*. Upper Saddle River: Pearson, (2005), p. 14.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid. p. 75.

¹⁹⁶ Winship, C.W. & Morgan, S.L. The Estimation of Causal Effect from Observational Data. *Annual Review of Sociology*. Vol. 25, (1999), pp. 659-706.

possibility of demonstrating it; he did not believe we could prove cause.¹⁹⁷ Kant, meanwhile, in what is often regarded as a response to Hume, argues that there is more to causation than regularity or habit. Whilst accepting that the concept of cause and effect alone cannot provide us with the necessary connections between objects, he argues that through the use of reason we may arrive at causal explanations.¹⁹⁸ If repeatability holds, we are using reason; the rule that is being observed is the result of empirical investigation.¹⁹⁹ In order for a causal connection to be claimed not merely regularity but also causal power, causal production and causal necessity have to be demonstrated. Causal power is the power to bring about, or cause, a state of affairs of a certain type, the effect. The exercise of this power results in the causal production, which, in turn, means that the corresponding effect must happen, the causal necessity.²⁰⁰ Kant concludes that cause and effect are connected by rules that we can identify, the causal principle may therefore be defined as: “for every event X there must be a different event Y and a rule R such that the occurrence of X follows from the occurrence of Y according to the rule R”.²⁰¹

A number of issues would arise in this thesis if the relationships being explored were to be assessed through causal inference. With regards to the relationship between radical feminism and republicanism a causal relationship would aim to claim that the radical feminist position was a result of republican theory. It would have to be demonstrated that, for instance, the radical feminists read republican writers and from these readings arrived at their position. This interpretation, though, would be false. Not only is it not the case that the radical feminists arrived at their position as a direct result of republican theory, but it is also not the aim of this thesis to demonstrate that. The aim of this thesis is to strengthen the radical feminist position with regard

¹⁹⁷ Norton, D.F. & Taylor, J. (eds.) *The Cambridge Companion to Hume*. Cambridge: Cambridge University Press, (2009), pp. 6-16.

¹⁹⁸ Bayne, S.M. *Kant on Causation – On the Fivefold Routes to the Principle of Causation*. Albany: State University of New York Press, (2004), p. xi.

¹⁹⁹ *Ibid.* p. 40.

²⁰⁰ Langsam, H. Kant, Hume, and our Ordinary Concept of Causation. *Philosophy and Phenomenological Research*. Vol. 54. No. 3, (Sept 1994), p. 626.

²⁰¹ Harper, W.A. & Meerbote, R. (eds.) *Kant on Causality, Freedom, and Objectivity*. Minneapolis: University of Minnesota Press, (1984), p. 20.

to speech restrictions; this strengthening, it is argued, is facilitated by being able to align radical feminism with republicanism. However, the nature of this relationship is not a causal one.

Similarly, with regard to the case study countries and the influence of liberal or republican theory upon the free speech legislations of each case, the relationship that is being assessed is not causal. It is beyond the scope of this thesis to attempt a thorough empirical analysis of each of the case study countries in order to show causality. To claim causality with regards to a republican or liberal influence upon the constitutions and resulting free speech legislation of Finland and Spain respectively would also ignore numerous other factors that have had an impact upon the policies in each case. I argue, nevertheless, that republicanism and liberalism can be aligned with these two constitutions by the investigator as a way of understanding how they promoted different perspectives on the legislation in question. Again, however, something other than causation needs to be assessed in order to arrive at this relationship.

Elective Affinity

A model that seems more suitable for the purpose of assessing the relationships in question is Weber's notion of elective affinity. This idea is used "in situations where it seems likely that there is an association or connection between systems of belief operating in different spheres of life".²⁰² The concept is described as the way in which Weber relates ideas and interests as a theoretical alternative to the causality model referring to acausal connections.²⁰³ It would thus seem that on the surface this model is suitable to explore for explaining the relationships being assessed in the thesis.

The notion of elective affinity originates in the natural sciences and refers to "the laws of association and disassociation amongst the

²⁰² Scott, J. & Marshall, G. *Oxford Dictionary of Sociology*. Oxford: Oxford University Press, (2009), p. 2008.

²⁰³ Howe, R.H. Max Weber's Elective Affinity: Sociology within the Bounds of Pure Reason. *American Journal of Sociology*. Vol. 84, No. 2, (Sept 1978), p. 366.

elements".²⁰⁴ The term (*wahlverwandtschaft*) first entered the German language in 1779; *verwandtschaft* (affinity) denotes a blood relationship and *wahl* (elective) suggests a choice in this matter.²⁰⁵ As a term it was first developed by those studying chemistry; although it can be traced back to the 13th century, the term elective affinity did not gain wide recognition until the 18th century with the work of Torbon Bergman.²⁰⁶ Bergman defines elective affinity as:

Suppose A to be a substance for which other heterogeneous substances, a, b, and c, have an attraction; suppose further A combines with c to saturation (this union I shall call Ac), should, upon the addition of b, tend to unite with it to the exclusion of c, or to have a stronger elective attraction for it...What I here call attraction, others denominate affinity.²⁰⁷

From chemistry the term entered into literature, predominantly through Goethe's novel by the same name. In *Elective Affinity* Goethe interpreted the natural law described by Bergman and applied the ideas to inter-human relationships.²⁰⁸ The subject of the novel is a married couple who once two other individuals are introduced into their lives dissolve their relationship in order to start a new one with one of these individuals introduced. The influence of Goethe upon Weber is well documented,²⁰⁹ and it is thought that it was from this novel that the term reached him.²¹⁰

Weber himself first introduced the term in 1904 in his methodological essay *Objectivity*²¹¹. Most famously, though, the term is used by him in *The Protestant Ethic and the Spirit of Capitalism*, where Weber assesses the relationship between the protestant belief system and the emergence of capitalism. He concluded that although the protestant ethic did not give birth to capitalism, it being possible for it to arise under a different belief system, a special affinity between the two is observable and facilitated capitalism.²¹² Although Weber never provides a clear definition of the term, both the ways

²⁰⁴ Ibid. p. 370.

²⁰⁵ Ibid.

²⁰⁶ Ibid. p. 374.

²⁰⁷ Ibid.

²⁰⁸ Buss, A. The Concept of Adequate Causation in Max Weber's Comparative Sociology of Religion. *British Journal of Sociology*. Vol. 50, No. 2, (June 1999), p. 318.

²⁰⁹ Antonio R.J. & Glassman, R.M. (eds.) *A Weber-Marx Dialogue*, Lawrence: University Press of Kansas, (1985), pp. 68-82.

²¹⁰ Javier Trevino, A. Parson's Action-System Requisite Model and Weber's Elective Affinity: A Convergence of Convenience. *Journal of Classical Sociology*. Vol. 5, (2005), p. 327.

²¹¹ Ibid. p. 326.

²¹² Parkin, F. *Max Weber*. London: Routledge, (2002), p. 43.

in which it is used by him and the manner in which it fits into his broader beliefs mean that it is possible to discern a definition for it. Weber positions elective affinity in opposition to two models of causal explanation, Marxist determinism²¹³ and functionalist mutual dependence.²¹⁴ Through his critique of these two models Weber arrives at an alternative approach “that necessitates studying the combining of multiple elements as they come to form complex affinities”.²¹⁵

Affinities are features that concepts have in common with other concepts. “As an idea of reason, affinity stood as an ideal for concept formation, a maxim for the conduct of intellect”.²¹⁶ Weber goes on to argue that there are webs connecting concepts, ideas and interests. When there is an adequate connection between concepts they are said to have an inner affinity; although this is not to say that their connection follows from a causal law.²¹⁷ The idea of elective affinities is that ideas and interests chose a partner to which they have an affinity, clustering together due to an internal logic between them.²¹⁸ These elective affinities may, as in Goethe’s novel and the chemistry that inspired it, end one connection in favour of another; with this possibility being part of the elective element.²¹⁹ In elective affinities it is not possible to identify a cause, as the two forces attract and act upon each other.²²⁰ As a result of the relationship being acausal, the union creates something new, there is an emergence.²²¹

²¹³ Marxist determinism: “the view that everything occurs lawfully. That is, for any event there is a set of laws or regularities connecting it with other events”. Sherman, H. Marx and Determinism. *Journal of Economic Issues*. Vol. 15, No. 1, (Mar 1981), p. 62.

²¹⁴ Functionalist mutual dependence: as originating from the work of Durkheim. Perceives society as a whole with each part playing a role in the broader functioning. In order for the whole to function each part is dependent on the other parts. Anderson, M.L. & Taylor, H.F. *Sociology – Understanding a Diverse Society*. Belmont: Thomson, (2006), p. 20.

²¹⁵ Javier Trevino, A. Parson’s Action-System Requisite Model and Weber’s Elective Affinity: A Convergence of Convenience. *Journal of Classical Sociology*. Vol. 5, (2005), p. 329.

²¹⁶ Howe, R.H. Max Weber’s Elective Affinity: Sociology within the Bounds of Pure Reason. *American Journal of Sociology*. Vol. 84, No. 2, (Sept 1978), p. 377.

²¹⁷ *Ibid.* p. 378.

²¹⁸ Gerth, H.H. & Wright Mills, C. *From Max Weber: Essays in Sociology*. London: Routledge, (1967), pp. 61-63.

²¹⁹ McKinnon, A.M. Elective Affinities of the Protestant Ethic: Weber and the Chemistry of Capitalism. *Sociological Theory*. Vol. 28, No. 1, (March 2010), p. 114.

²²⁰ *Ibid.* p. 116.

²²¹ *Ibid.* p. 123.

The concept of elective affinity seems to be more suitable for assessing the relationships in this thesis than causal inference was shown to be. Causality is not being claimed in this thesis; however, it is being argued that there is a relationship between republicanism and radical feminism on the one side, and liberalism and republicanism and the Spanish and Finnish constitutions respectively, on the other. As in Weber's *Protestant Ethic*, there seems to be an affinity between republicanism and radical feminism and the constitutions and the theories, which can facilitate a reading of the relationships and their coupling. However, the affinity being posited here is necessarily an empirical one. While that may indeed exist, this thesis does not seek to establish such a link. Instead, I have used alignment to establish what is basically a largely theoretical affinity of a different kind, more like what Wittgenstein termed a 'family resemblance'.²²²

Alignment

Therefore, though the conceptual use of alignment in this thesis draws on Weber's elective affinity, it differs in two key respects. Firstly, as I noted above, elective affinity refers to a relationship which although non-causal, is considered as existing for the actors involved. Alignment, as previously mentioned, is a relationship that exists for the investigator but not necessarily the actors involved. The possibility of such a relationship is advanced by Weber's view that in the social sciences we do not understand, but, rather, observe. As observers, we impose our own explanations upon phenomena, our own concepts and categories.²²³ The acceptance of an ideological lens through which we assess things, means that it is not invalid to aim and find an affinity between these different elements.

²²² Wittgenstein uses the term 'family resemblance' when talking about connections between things; explaining that connections need not mean that things are identical: "if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that...we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail. I can think of no better expression to characterize these similarities than "family resemblance"; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way" Wittgenstein, L. *Philosophical Investigations*. Oxford: Blackwell Publishers, (1997), pp. 31-32.

²²³ Parkin, F. *Max Weber*. London: Routledge, (2002), p. 18.

The second difference between alignment and elective affinity stems from elective affinity, besides suggesting a legitimising relationship, also implying that the resulting relationship is a merging of the elements involved. The word affinity suggests a common source or natural relationship. By coupling affinity with elective the implications for the character of the relationship being assessed alter, the proposition of an amalgamation, though, remains. Just as a causal relationship is not being claimed in this thesis neither is a merging. I am not claiming a hybrid theory of republicanism and radical feminism, rather, I am highlighting that the theories point in the same direction and that there are grounds for assessing them alongside each other. Similarly, republicanism and liberalism facilitate a reading of the Finnish and Spanish constitutions, but these need not be viewed as merged.

In alignment then, the investigator may consider that there is an affinity between the elements, in the sense of A promoting or facilitating a better understanding of B; but not in the sense of the relationship leading to or implying AB because A was actually necessary to bring about B. For, the relationship may not exist for the actors involved but merely the investigator. The dictionary definition of alignment is useful here to explain the kind of relationship being referred to. Alignment is defined in the *Oxford English Dictionary* as:

1. Arranging in a straight or other determined line; mode of arrangement in lines.
2. Arrangement of soldiers in line or lines.
3. The drawing of a straight line in such a position that it shall pass through a particular point.
4. The action of bringing into line; straightening.
5. (Polit.) The process or result of aligning (to being into line with a particular tradition, policy, group, or power); the grouping or agreement of parties or powers.²²⁴

As opposed to a merging, as is the case with elective affinity, alignment suggests a parallel between the elements. As implied by the words' dictionary definition, the elements being assessed in relation to alignment can be seen as in line with each other by the investigator. Affinity was considered by Weber as features that concepts have in common with other

²²⁴ www.oed.com (Accessed 09/05/2011).

concepts. The investigator may see parallels or similarities between concepts and claim an alignment.

In the case of the radical feminists and republicanism, it is being argued that a republican reading of freedom offers an underpinning and conceptualisation of the radical feminist literature. Republicanism deepens the notion of domination, in contrast with liberal theories of free speech which focus on interference. A republican conception of freedom as non-domination is regarded here as articulating the radical feminist concerns in a way that the radical feminists do not themselves do. With regard to the case studies, republicanism and liberalism are regarded as facilitating a reading of the Finnish and Spanish constitutions and of the specific legislation regarding speech. A republican discourse is a way of giving a plausible coherence to the Finnish constitutional approach. Republicanism offers a normative account that parallels Finland's constitution and, to the extent it was evoked by the actors concerned, facilitated the adoption of certain policies. Similarly for the case of Spain, liberalism offers a normative account that parallels the concerns of the constitution and how these have affected free speech legislation. Further specifics of these alignments will be elaborated upon in Chapters 3 and 4, with regard to the relationship between radical feminism and republicanism, and Chapters 5 and 6, with regard to the case studies.

1.7 Conclusion

Through exploring the definitions of pornography and racist hate speech provided by radical feminism and CRT, respectively, the validity of using these theoretical approaches for the purpose of exploring the central research question of this thesis has been assessed. More importantly, though, this exploration of the definitions has also provided a rationale for using a theoretical model based on the case of pornography for the case of racist hate speech. Despite differences between these two forms of speech, the similarities between them are of greater importance than the differences.

The next chapter will explore the radical feminist and CRT critiques of liberalism's stance on free speech; in particular criticisms which focus on what they regard as liberalism's free speech absolutism. Irrespective of these

criticisms, the radical feminist model being focused on should not be regarded as illiberal. Much feminist literature, including the works of Andrea Dworkin and Catharine MacKinnon, is influenced by liberal theory; a particularly influencing element being Mill's *harm principle*. Chapter 2 will demonstrate that the radical feminist position is not illiberal. Moreover, that there is theoretical room, within the liberal perspective, to allow for restrictions upon pornography similar to those recommended by the radical feminists. The restrictions permitted within the liberal view, though, would not be as extensive as those the radical feminists argue for. A central concern of the radical feminists, issues of power and domination in society and the role which speech plays in perpetuating these, is overlooked by liberal theory.

The case of racist hate speech is somewhat different. Although limited restrictions upon hate speech may be permissible in certain instances from a liberal perspective, for example in the case of discrimination through racist hate speech by an employer against an employee, there would not be room to restrict the racist hate speech of far right political organisations. Political speech is given a primacy within liberal theory; restrictions upon this form of speech are regarded as harmful to the democratic process and the development of human society at large. Bearing in mind the gaps which the radical feminist perspective finds with the liberal view, the possibility for restrictions to be placed upon the racist hate speech of extreme right political organisations will be assessed.

Chapter Two

Liberalism and Freedom of Speech

This chapter has two principal aims. First, to demonstrate that the radical feminist position is not anti-liberal, per se, if this is taken to mean disregarding rights. In order to assess this claim, I will analyse two liberal rationales for sustaining freedom of speech. The first rationale is that of neutrality. This rationale is in turn broken up into harm and rights based approaches. The second rationale is that of autonomy. I will outline each position and critique it from the radical feminist perspective. The purpose of this critique will be to ascertain which liberal rationale in favour of freedom of speech would be most suited to the radical feminist position and to possible restrictions on pornography and extreme right political organisations' racist hate speech. The two approaches linked to neutrality will be given greater attention as these are the liberal arguments that the radical feminists focus on critiquing; they are also the liberal arguments feminism has been predominantly influenced by. The second aim of this chapter is to draw out the concerns that the radical feminists have with pornography and racist hate speech that are lacking in the liberal argument. In particular, concerns with power and domination and the role that speech may play in perpetuating them. It is due to these concerns that a republican conception of freedom as non-domination is being presented in this thesis as more suitable for underpinning the radical feminist stance.

In order to obtain a clear picture of each position, the assessment of each approach will be subdivided into four sections. First, I will outline the approach's rationale for freedom and freedom of speech. Second, I will outline what the implications are of this rationale for the case of pornography; including a discussion of any engagement with the case of pornography by theorists within the approach. Third, I will outline the implication of the rationale for the case of racist hate speech of extreme right political organisations. And fourth, I will examine the radical feminist critique of the approach.

2.1 Neutrality Rationale

Liberal arguments in favour of freedom of speech on the basis of neutrality may be subdivided into harm and rights based approaches. Harm based approaches are exemplified by the work of John Stuart Mill in *On Liberty*; whilst rights based approaches are exemplified by the work of Ronald Dworkin.

Harm Based Approaches

From this perspective, neutrality essentially refers to neutrality towards conceptions of the good; a belief that the acceptance of individuals' varying conceptions of the good is the optimum condition for the development of human society. Theories regarding individual freedom developed from this stance argue that only through freedom of thought and action can individuals arrive at their own conception of the good. This argument is extended in favour of freedom of speech. Harm based approaches originally derive from the work of John Stuart Mill. Due to Mill's Utilitarian influences, harm based approaches tend to follow Utilitarian rationales in favour of neutrality towards conceptions of the good. Mill states that "if all of mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind".²²⁵ In Mill's view, to suppress an opinion is to harm the whole of mankind; if the opinion was correct, a falsity has prevailed; if the opinion was false, the truth has been deprived of a vital opportunity to prove itself against a falsehood.²²⁶ Due to human fallibility, we can never be certain of an opinion being false; moreover, only through contrasting with falsities can we identify truths. In order for society to be able to develop truths, mankind must develop its mental faculties and understand the grounds for its opinions. According to Mill, such development could only be achieved through open discussion on matters of conflict with others who have different opinions from us. A diversity of opinions is also vital in instances of two opinions sharing the truth.

²²⁵ Mill, J.S. *On Liberty*. London: Penguin Classics, (1974), p. 76.

²²⁶ Ibid.

Despite this view in favour of freedom, it is accepted that absolute individual freedom is inconsistent with community living; thus, limits delineate the legitimate restrictions that may be placed upon the freedom of individuals by a liberal state. These limits are guided by *harm principle*. Originally developed by Mill in *On Liberty*, the *harm principle* has since been expanded and reinterpreted by liberal theorists. The basis of the *harm principle* is that individual freedom can be justifiably curtailed in the case of that individual causing harm to another. Hence the legitimacy of laws is accepted despite them being recognised as a breach upon individual freedom. In addition, Mill, unlike other liberals, did not oppose “state intervention as such; he welcomed it in education and labour legislation because he thought that without it the weakest would be enslaved and crushed”.²²⁷ As a result, there may be the possibility of extending the area over which state legislation is legitimate. This extension, though, may nonetheless remain limited due to the weight placed by Mill upon public or collective opinion, condemnation from which he regarded as extremely powerful.²²⁸ The possibility of limited legal restrictions is furthered by the fact that Mill regarded these as having negative side effects for society.²²⁹

The *harm principle* is defined by Mill as:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others....The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.²³⁰

The *principle* is accompanied by a clause holding people accountable for failing to fulfil social duties in the instance of this leading to another being harmed. Hence, an individual “may cause evil to others not only by his actions but by his inactions”.²³¹ Liberals following this approach accept that the *principle* only applies to individuals who have reached maturity and are in

²²⁷ Berlin, I. John Stuart Mill and the Ends of Life. in Gray, J. & Smith, G.W. (eds.) *J. S. Mill On Liberty – In Focus*. London: Routledge, (1991), p. 137.

²²⁸ Rees, J.C. A Re-Reading of Mill of Liberty. in Gray, J. & Smith, G.W. (eds.) *J. S. Mill On Liberty – In Focus*. London: Routledge, (1991), p. 170.

²²⁹ Ryan, A. John Stuart Mill’s Art of Living. in Gray, J. & Smith, G.W. (eds.) *J. S. Mill On Liberty – In Focus*. London: Routledge, (1991), p. 163.

²³⁰ Mill, J.S. *On Liberty*. London: Penguin Classics, (1974), pp. 68-69.

²³¹ *Ibid.* p. 70.

full control of their faculties. It is important to note that Mill accepts that opinions can lead to harm.²³²

A contemporary theorist that has developed the concept of the *harm principle* is Joel Feinberg, who further draws out the restrictions which the harm approach sees as legitimate. Feinberg accepts that “the need to prevent harm to others is always a reason in support of state coercion”.²³³ He argues, though, that a way to differentiate between harms is necessary if one is to get around the fact that to coerce A to prevent harm to B means harming A. To try and resolve this, Feinberg suggests assessing the importance of the related interest. “The interest of a ‘standard person’ of a given type in X may be more important than his interest in Y in that harming his interest in X will do less harm on balance to his net personal interest than would harming his interest in Y”.²³⁴ Feinberg believes people’s most vital interests are their welfare interests; breaching minimal requirements of these preventing people from achieving higher interests.

Like Mill, Feinberg acknowledges that there are instances in which speech can cause harm. He recommends that in such cases speech be curtailed. Amongst these cases, Feinberg includes defamation and malicious truths; invasion of privacy; causing panic; provoking retaliatory violence and incitement to crime or insurrection.²³⁵ In each case specific clauses are included to determine whether speech should be curtailed. Harm, for example, must be great and immediate; there are instances in which the speaker must intend to cause harm in order for curtailment to be valid and, as in the example of provocation, what is considered as harmful speech is only the spoken, as printed speech can be easily avoided without any great inconvenience.

When considering restrictions upon speech Feinberg also assesses the question of offensive speech, which he subdivides into mere utterance

²³² Ibid. p. 119.

²³³ Feinberg, J. *Rights, Justice, and the Bounds of Liberty – Essays in Social Philosophy*. Princeton: Princeton University Press, (1980), p. 30.

²³⁴ Ibid. p. 32.

²³⁵ Feinberg, J. *Freedom and Fulfilment – Philosophical Essays*. Princeton: Princeton University Press, (1992), pp. 128-141.

and offensive nuisance.²³⁶ Whilst accepting that the mere utterance of offensive words has the capacity to offend, he sees no grounds under which this can be legally forbidden. He argues that it is the context in which these words are said that leads to offence, such as in instances where it is ill mannered. Ill manners are considered too trivial by him to necessitate legal regulation; if these words were uttered in private or in the company of people who felt similarly, then no offence would occur. Only those people whose psyche is too weak would be harmed by the mere utterance of an offensive word.²³⁷ “The offence principle, then, cannot justify the criminal prohibition of the bare utterance of obscenities in public places even when they are used intentionally to cause offence”.²³⁸ Offensive nuisance, though, is an instance in which the offended party cannot escape the offence without significant inconvenience. In such instances legitimate legal intervention is possible.

The argument for offensive nuisance can be paralleled with Hart’s differentiation between that which is immoral and a breaching of public decency; with only the latter constituting possible grounds for restrictions upon freedom.²³⁹ Hart deals with the issue of people being offended due to the mere knowledge of the existence of an offensive act, with him concluding that

A right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognises individual liberty as a value.²⁴⁰

Hart also sees no moral worth in forbidding people from committing immoral acts, arguing that it is of higher moral value to abstain from something than to submit to coercion.²⁴¹ As opposed to legal enforcement, Hart believes that the most adequate way of reaching a shared social morality is deliberation.

Implications for Pornography

The radical feminist argument for restricting pornography is based on a belief that it leads to tangible harms. As a result, a number of feminist theorists

²³⁶ Feinberg, J. *Obscene Words and the Law*. *Law and Philosophy*. Vol. 2, (1983), p. 139.

²³⁷ *Ibid.* p. 142.

²³⁸ *Ibid.* p. 146.

²³⁹ Hart, H.L.A. *Law, Liberty and Morality*. Oxford: Oxford University Press, (1963), p. 44.

²⁴⁰ *Ibid.* p. 46.

²⁴¹ *Ibid.* p. 58.

have aligned themselves with the Millian harm approach, the difficulties lie, though, in what is to be considered as harm. Despite the radical feminists claiming that what is caused by pornography is harm, liberals have tended to disagree. From the perspective of the harm based approaches the difference between the self and other regarding arenas is central to assessing what is to be considered as harm. These are the two arenas which Mill differentiates in order to assess where the individual may legitimately have her freedom curtailed, with freedom in the self-regarding arena being prioritised and thus restrictions predominantly being possible in the other-regarding arena. The difference between these arenas, though, has also been a principal point of criticism against the *harm principle*.²⁴² It is difficult to differentiate between the self and other regarding arenas, it is generally accepted that within human society most individual conduct will have some impact upon another. These criticisms, though, at times ignore the fact that the harm approach, and even Mill himself, acknowledges this difficulty. In *On Liberty*, whilst accepting that what affects the individual may affect others through them, Mill clarifies what is meant by self-regarding conduct: “the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects”.²⁴³

J. C. Rees supports Mill’s stance on the self and other regarding arenas, arguing that Mill accepts that those actions which fall within the self-regarding arena do frequently affect others.²⁴⁴ According to Rees, Mill differentiates between actions which do not affect others and actions which do not affect the interests of others, the first of these is unlikely to ever take place and the latter is the self-regarding arena. For Rees, interests “depend for their existence on social recognition and are closely connected with prevailing standards about the sort of behaviour a man can legitimately

²⁴² For such criticisms see: Stephen, J.F. *Liberty, Equality, Fraternity, and Three Brief Essays*. Chicago: Chicago University Press, (1991); Anschutz, R.P. *The Philosophy of J.S. Mill*. Oxford: Clarendon Press, (1953).

²⁴³ Mill, J.S. *On Liberty*. London: Penguin Classics, (1974), p. 71.

²⁴⁴ Rees, J.C. A Re-Reading of Mill of Liberty. in Gray, J. & Smith, G.W. (eds.) *J. S. Mill On Liberty – In Focus*. London: Routledge, (1991), p. 171.

expect from others”.²⁴⁵ He excludes from the self-regarding arena trivial actions which may nevertheless have an impact upon others. My intuition, similar to Rees’, is that Mill refers to more than the effects of trivial actions. Mill accepts that “whatever affects himself may affect others through himself”;²⁴⁶ the self-regarding arena, though, is that which primarily affects the individual. For the possibility of restrictions upon pornography this view seems favourable. Irrespective of which of the two arenas pornography falls within, the possibility to cause harm to others is recognised in both.

It would also seem that from Feinberg’s conception of the *harm principle* restrictions upon pornography could be supported. The radical feminists would argue that a number of the welfare interests he identifies are breached by pornography when considering women, due to the image of women as subservient/subordinate to men that is portrayed. These interests include absence of groundless anxiety and resentment, the capacity to engage normally in social intercourse and a tolerable social and physical environment. Moreover, Feinberg states that the morality of an interest can be taken into account when assessing its value; with sick, morbid, sadistic, and depraved interests ranking below others.²⁴⁷ From the radical feminist stance, pornography could be equated with such attributes as are present in lower ranking interests. Pornography could in turn be ranked as lower than the interests of women.

The issue of morality and the role that this could legitimately play in restricting freedom is an important one. A common attack upon the radical feminists focuses on pornography being a moral issue and not a question of tangible harm. Moreover, restrictions along moral lines would breach neutrality towards conceptions of the good. If it is a moral issue, from a Millian perspective, the extension of the *harm principle* to include restrictions upon pornography could be difficult due to Mill’s clear stance regarding morality-dependant distress. Although accepting its severity, he is adamant that “neither the intensity of the distress nor the number of people who share

²⁴⁵ Ibid. p. 175.

²⁴⁶ Mill, J.S. *On Liberty*. London: Penguin Classics, (1974), p. 71.

²⁴⁷ Feinberg, J. *Rights, Justice, and the Bounds of Liberty – Essays in Social Philosophy*. Princeton: Princeton University Press, (1980), p. 34.

it seem to affect the conclusion that it is illegitimate for the majority to impose its values on the rest of society”.²⁴⁸ Hart, despite not aligning himself with the *harm principle*, develops arguments regarding the state having no grounds to enforce morality. Hart’s work is particularly relevant to the case of pornography as he is concerned with enforcements of sexual morality. Hart regards this as important due to the grave effects it can have upon an individual’s happiness and emotional life. In addition, Hart argues that, when regarding sexual matters, morality is multiple, as opposed to single; making it extremely difficult to legislate on such matters.²⁴⁹ As pornography falls within the realm of sexual matters, it being considered by many as a tool for sexual gratification, the possibility of restrictions seems hindered by this argument.

Feinberg’s approach of using the morality of interests to rank their importance, though, seemed to suggest that it may be possible to curtail freedom on moral grounds. He, however, denies this possibility. Feinberg argues that there are grounds to curtail freedom in order to prevent offence, with him differentiating between preventing offence and enforcing morality: “preventing offence...is at least a ground for limiting liberty, whereas the enforcement of morality as such is never a valid ground”.²⁵⁰ Although Feinberg recognises that Mill stated that offence was not sufficient grounds for curtailing freedom of speech, he believes it to be an issue of different conceptions of speech. “Mill did not consider public nudity, indecency, public display of ‘dirty pictures’, and the like to be forms of ‘symbolic speech’ or expressions of opinion of any kind”.²⁵¹ He goes on to argue that for speech the only purpose of which is to offend, the presumption in favour of liberty is weaker. It would seem that Feinberg could be aligned with the radical feminist’s view on pornography. It is possible to argue that pornography is speech that sets out to offend. One must be careful, though, when considering whether the intent behind this speech is, indeed, to offend. Some

²⁴⁸ Ten, C.L. Mill’s Defence of Liberty. in Gray, J. & Smith, G.W. (eds.) *J. S. Mill On Liberty – In Focus*. London: Routledge, (1991), p. 214.

²⁴⁹ Hart, H.L.A. *Law, Liberty and Morality*. Oxford: Oxford University Press, (1963), p. 63.

²⁵⁰ Feinberg, J. *Rights, Justice, and the Bounds of Liberty – Essays in Social Philosophy*. Princeton: Princeton University Press, (1980), p. 69.

²⁵¹ *Ibid.* p. 71.

would argue it is a political message, artistic expression, or sexual stimulation.

The matter of the self and other regarding arenas comes back as an issue with regard to offence as a principle to limit the freedom of the individual. Despite accepting offence as legitimate grounds for curtailing freedom of speech, Feinberg is clear to differentiate between the public and private arenas.²⁵² Speech may be offensive when uttered publicly; when uttered in private by consenting adults, though, the state cannot legislate. In addition, Feinberg also concedes that it is extremely difficult to stipulate what is to be considered as offensive, with what is found offensive varying from person to person. In an attempt to legitimise the offence principle, Feinberg outlines two standards that must be followed. The first is the standard of universality: in order for an act to be considered offensive almost any person chosen at random should find the act offensive. Feinberg accepts, though, that there are some offensive acts which target minorities, be they based on race, religion, sex, or gender. As such, these acts would not necessarily be offensive to the majority, such acts, though, should still be considered offensive.²⁵³ The second is the standard of reasonable avoidability: if the offensive act can be avoided easily and without inconvenience, then no one need be protected from it.²⁵⁴

From this rationale it could be argued that Feinberg would accept legitimate restrictions upon public displays of pornography; private consumption, though, could not be legitimately restricted. Moreover, Feinberg specifies that the principle of reasonable avoidability does not exclude books, including obscene books, as these are easily avoidable.²⁵⁵ Thus, despite the fact that from the radical feminist perspective, the clause protecting from sexual discrimination could be regarded as legitimate grounds under which to restrict pornography, Feinberg is clear that the private consumption of pornography cannot be restricted. Mill also tackles the differences between the public and private arenas with regard to offence;

²⁵² Ibid. p. 76.

²⁵³ Ibid. pp. 88-89.

²⁵⁴ Ibid. p. 89.

²⁵⁵ Ibid. p. 89.

talking of acts which, although only harmful to the agent, “if done publicly are a violation of good manners and, coming thus within the category of offence against others, may rightly be prohibited. Of this kind are offences against decency”.²⁵⁶ Again, it seems that the public display of pornography could be restricted; however, there would be no room to restrict private consumption.

It would seem that there is room within the harm approaches for pornography to be curtailed. In order for restrictions to be valid, though, the harms which the radical feminists claim pornography causes must be clearly demonstrated. Restrictions would also not be applicable to private consumption of pornography, as the differentiation within the *harm principle* of the private and public arenas means that there are fewer grounds for restrictions within the private arena. A further parallel between this perspective and the radical feminists could be drawn from concerns with the subordination of women by men that are to be found within harm based approaches. Mill argues that:

The legal subordination of one sex to the other – is wrong in itself...it ought to be replaced by a principle of perfect equality, admitting no power or privilege on one side, nor disability on the other.²⁵⁷

Although it is of interest to note that Quentin Skinner argues that Mill's account on the subjection of women takes into account issues of domination and should in fact be considered as a republican account.²⁵⁸

Implications for Racist Hate Speech

Harm based approaches grant greater importance to political speech than to other forms of speech. In Mill's view political speech should be granted greater protection than other forms of speech, he states that “in politics, again, it is almost a commonplace that a party of order or stability and a party of progress or reform are both necessary elements of a healthy state of political life”.²⁵⁹ Mill's rationale lies in the role which political deliberation plays in the development of human society, in line with Mill's Utilitarian impetus behind freedom. Feinberg also defends the primacy of political

²⁵⁶ Mill, J.S. *On Liberty*. London: Penguin Classics, (1974), p. 168.

²⁵⁷ Mill, J.S. *The Subjection of Women*. in Ryan A. (ed.) *Mill – Texts, Commentaries*. London: Norton, (1997), p. 133.

²⁵⁸ Skinner, Q. *Liberty Before Liberalism*. Cambridge: Cambridge University Press, (2001), pp. ix-x.

²⁵⁹ Mill, J.S. *On Liberty*. London: Penguin Classics, (1974), p. 110.

speech, arguing that it is imperative for the public to have all information relating to public policy available to them.²⁶⁰ Although it should be noted that Mill is prepared to restrict speech that is a direct incitement to violence.²⁶¹ If racist hate speech were demonstrated to result in incitement, it could possibly be restricted. The burden of proof for showing this link between the speech of a political organisation and the individual harmed, though, would be great. The possibilities of restrictions would therefore remain limited.

It seems clear that irrespective of the fact that there are ways in which the harm approach could be aligned with the radical feminist argument with regard to pornography; this approach would not favour restricting the racist hate speech of extreme right political organisations due to it being political speech.

Radical Feminist Critique

The narrow possibilities for restrictions upon pornography found within the harm based approaches lead the radical feminists to make numerous critiques of this position. First, it should be noted that within CRT there are those who argue that there are certain viewpoints which society has accepted are wrong, amongst these are genocide, racism and sexism.²⁶² Such an acceptance challenges Mill's free marketplace of ideas. The free marketplace of ideas is also criticised for ignoring the fact that some have more speech than others, which, in turn, has given those with more speech more power. Liberal free speech doctrine argues for fewer restrictions upon speech, in reality, though, it results in fewer restrictions upon those who have powerful speech. Those with powerless speech are silenced not by official means but by lack of access to speech.²⁶³ Such silencing, though, is merely regarded as the marketplace of ideas at work; hence the powerful speech is further empowered by being granted the title of *truth*. Liberal arguments related to the free marketplace of ideas and this serving the pursuit of truth,

²⁶⁰ Feinberg, J. *Freedom and Fulfilment – Philosophical Essays*. Princeton: Princeton University Press, (1992), p. 150.

²⁶¹ Mill, J.S. *On Liberty*. London: Penguin Classics, (1974), p. 55.

²⁶² Wolfson, N. *Hate Speech, Sex Speech, Free Speech*. London: Praeger, (1997), p. 2.

²⁶³ MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993), p. 78.

are also criticised. Whilst accepting that in an equal society this would be an ideal to pursue, this is not the kind of society in which we live. Because male speech has more power in society, due to the gender inequalities of society, what the free marketplace of ideas achieves, in practice, is that the powerful impose their image of the powerless as the truth. Men's pornography silences and dominates women.²⁶⁴ For women, the principal issue regarding free speech is not one of avoiding state intervention; rather, it is a struggle to access this allegedly *free* speech.

Moreover, a large part of the liberal stance opposed to restricting pornography, in particular a Millian stance, is framed around theories which were developed before the harms which women suffer were recognised, before the camera became widely available and real women were used to produce pornography. Thus, much in the stance is not suited to dealing with the issue of pornography today.²⁶⁵ In addition, harm based approaches also fail to recognise the fact that pornography is not the speech of a small section of society which must be protected from the oppressive masses; rather, it is powerful speech which is widely available and dissipated throughout society. Furthermore, liberalism's focus on the individual means that the harms caused by pornography, predominantly harms to individuals as members of a group, are not recognised.²⁶⁶ Pornography, though, depicts women as a group, not as individuals; hence the harms it causes to women as a group should be recognised.

The principal critique of the harm based approaches from the radical feminist perspective, though, centres around the questions of morality and offence. As discussed in Chapter 1, the radical feminists do not regard pornography as a moral issue. They identify the harms caused by pornography as tangible. Moreover, they find the liberal classification of pornography within the realm of the obscene as exacerbating the harms caused. Obscene speech is largely judged on whether it is sexually arousing.

²⁶⁴ MacKinnon, C.A. Not a Moral Issue. in Mashchke, K.J. (ed.) *Gender and American Law – Pornography, Sex Work and Hate Speech*. New York: Garland Publishing Inc., (1997), pp. 11-12.

²⁶⁵ MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993), p. 8.

²⁶⁶ MacKinnon, C.A. Not a Moral Issue. in Mashchke, K.J. (ed.) *Gender and American Law – Pornography, Sex Work and Hate Speech*. New York: Garland Publishing Inc., (1997), p. 12.

With regard to pornography, such judgements have resulted in the more violent and oppressive material not being classified within the realm of restricted obscene speech, as jury members are unlikely to admit that they are sexually aroused by it. The obscene is also judged on whether it breaches community standards; the more pornography there is, though, the more it becomes a community standard.²⁶⁷ Moreover, “the more pornography one consumes, the more violent and aggressive it needs to be to produce a sexual response”.²⁶⁸ These issues are particularly pressing when considering pornification and the increase in pornographic consumption and growth in shock-porn. A similar issue arises to the case of morality when it comes to the case of offence. The radical feminists argue that they are not concerned with offence, despite them believing that pornography is, indeed, offensive; their concern is with it being harmful. From their perspective pornography would also not be considered as simply ill mannered behaviour. In addition, part of the harm caused by pornography is derived from the fact that it cannot be easily avoided. Feinberg may state that books of ‘dirty pictures’ can easily be avoided, the reality of pornography today, though, as was argued in the Introduction, is that it is everywhere.

The radical feminists are also critical of the distinction between the self and other regarding, or public and private, spheres. They argue that this distinction is different for men and women; that sexism exists in both spheres. They see this distinction as protecting “men’s right to inflict pornography upon women”.²⁶⁹ It is this distinction which results in it being only public displays of pornography that may be restricted from the harm based approaches. The radical feminists argue, though, that irrespective of where pornography is consumed, the harm caused by it is in the public arena; as it is here that women are oppressed, subordinated and dominated.

²⁶⁷ MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993), p. 88.

²⁶⁸ MacKinnon, C.A. *Women’s Lives – Men’s Laws*. London: Harvard University Press, (2005), p. 274.

²⁶⁹ MacKinnon, C.A. Not a Moral Issue. in Mashchke, K.J. (ed.) *Gender and American Law – Pornography, Sex Work and Hate Speech*. New York: Garland Publishing Inc., (1997), p. 11.

Rights Based Approaches

Rights based approaches see two principal problems with the harm approach. The first is based around the argument for neutrality, with those favouring rights based approaches questioning whether harm is, indeed, a neutral enough ground upon which to base judgements regarding the limits of freedom. The second problem is concerned with the Utilitarianism behind the Millian approaches, the issue being whether this is too permissive; those in favour of rights based approaches question whether some ideas are simply false. Perhaps the most prominent advocate of a rights based approach is Ronald Dworkin, whose work centres on the role of equality when considering freedom.

Dworkin's arguments are based around his doctrine of neutrality, which follows from a belief in individuals having a right to equal concern and respect. To achieve equal concern and respect, a broad sense of what must be considered legitimate actions by individuals within a society must be held, as people should not be discriminated against. Dworkin's doctrine of neutrality is heavily associated with the right which he is principally concerned with, equality. He argues that equality, as opposed to liberty, should be the prominent concern for liberals. His justification lies in two arguments: first, that "government must not only treat people with concern and respect but with equal concern and respect";²⁷⁰ and second, that government "must not constrain liberty on the ground that one citizen's conception of the good life is nobler or superior to another's".²⁷¹ Despite a strong belief in limited restrictions upon individuals, Dworkin does not follow a negative conception of liberty.²⁷² He sees validity in laws, due to the fact that "laws are needed to protect equality, and laws are inevitably compromises of liberty".²⁷³ Irrespective, legitimate grounds for the restriction of liberty remain very limited in Dworkin's theory; he sees only two justifications for this. The first is that of principles, whereby liberty may be restricted to protect the rights of an individual who will be injured by the

²⁷⁰ Dworkin, R. *Taking Rights Seriously*. London: Duckworth, (1977), p. 273.

²⁷¹ Ibid.

²⁷² Berlin, I. *Four Essays on Liberty*. Oxford: Oxford University Press, (1969).

²⁷³ Dworkin, R. *Taking Rights Seriously*. London: Duckworth, (1977), p. 267.

exercise of that liberty. The second is that of policies, whereby constraints are placed in order to reach an overall political goal.²⁷⁴

Another liberal with a strong belief in political equality is John Rawls. Rawls argues for one person one vote; this equal political participation for all citizens also includes all citizens having a right to freedom of speech, freedom of assembly and freedom to form political associations. Despite the primacy of political equality, though, it must be noted that Rawls states that liberty of conscience and thought and liberty of the person must not be “sacrificed to political liberty, to the freedom to participate equally in political affairs”.²⁷⁵ Regarding freedom of speech, Rawls accepts legitimate grounds for restriction. These restrictions, though, are limited to instances where they are implemented for the sake of greater liberty. He elaborates:

Without the acceptance of reasonable procedures of inquiry and debate, freedom of speech loses its value. It is essential in this case to distinguish between rules of order and rules restricting the content of speech. While rules of order limit our freedom, since we cannot speak whenever we please, they are required to gain the benefits of this liberty.²⁷⁶

In order for these restrictions to be legitimate, they must also be applied equally and be known to all members of society. Rawls also argues that the state has no grounds to differentiate between legitimate and illegitimate organisations, as this would not be treating all citizens equally.

A liberal whose work can be paralleled to Dworkin’s argument for equal concern and respect is Peter Jones. Jones theorises from the angles of offence and toleration. Offence has often been used as a rationale for restricting speech; the case of religion being a particularly contentious one, with scholars arguing that offence within this arena goes beyond what is generally perceived as offence due to the sanctity of the beliefs involved. Jones points out, though, that from a liberal perspective all beliefs must be regarded as equally valuable. Thus, either all beliefs must be protected or none can be. A protection of all beliefs, though, seems virtually impossible to implement, as there would be intrinsic clashes: how, for example, could the beliefs of both Jews and Nazis be protected equally? Due to these practical difficulties and Jones’ view that in a plural society a diversity of beliefs must

²⁷⁴ Ibid. p. 274.

²⁷⁵ Rawls, J. *A Theory of Justice*. Oxford: Oxford University Press, (1973), p. 201.

²⁷⁶ Ibid. p. 203.

be accepted, with him arguing, “my right to hold and to pursue my own beliefs does not, of itself, impose any limits upon what others may say about, or do with, the beliefs that I hold”,²⁷⁷ Jones concludes that the causing of offence in the instance of, for example, blasphemy, cannot be considered a crime.²⁷⁸

The offence argument, though, has been extended to include within its conception the idea that to attack, ridicule or hold in contempt the beliefs held by someone is to simultaneously do these things to those who hold the beliefs. Through offence we are undermining people’s right to freely follow their chosen belief system. Jones points out, though, that if the issue is offence, banning the material is irrelevant, since through its mere existence, rather than availability, the offence is caused.²⁷⁹ Thus, he sees as more plausible the argument derived from respect; if the issue is one of respect towards those who are being offended, the restriction of the material could be seen as an act of respect. Respect is also regarded by Jones as a more suitable line of argument, as it is not as subjective as offence, it generally being accepted that what offends one need not necessarily offend another.

Although Jones sees the respect principle as less problematic than the offence principle, this is not to say that he accepts it as justification for curtailing free expression. Jones points out that in order for all beliefs to be respected, due to the simple fact that clashes exist between beliefs, no beliefs could be voiced.²⁸⁰ In addition, religious, like political beliefs, fall within the other-regarding arena, with them consisting of ideas about the world. It seems absurd that these ideas about others cannot be criticised by others. It also seems problematic to classify as disrespectful a challenge to a belief in the pursuit of truth. In order to exemplify this view, he explores the possibility of resting the respect principle on given ‘off limits’ subjects. He rejects this argument, though, as extremely subjective and on the Millian grounds of a variety of opinions being necessary in the search for truth. As a

²⁷⁷ Jones, P. Respecting Beliefs and Rebuking Rushdie. in Horton, J. (ed.) *Liberalism, Multiculturalism and Toleration*. London: Macmillan, (1993), p. 116.

²⁷⁸ Ibid. p. 118.

²⁷⁹ Ibid. p. 121.

²⁸⁰ Ibid. p. 124.

result, he challenges whether any subjects should be placed beyond the reach of critical enquiry. He also contemplates the possibility of it being the manner in which something is said, rather than it being a criticism, which is problematic. Jones is careful to point out, though, that our freedom cannot be placed at the mercy of others and how they will react to our speech, as there are instances where “it is not that the speaker is saying something that he has no right to say; rather it is the others who are responding to his speech in an inappropriate manner”.²⁸¹

Implications for Pornography

Dworkin directly tackles the issue of pornography. He begins from the liberal presumption that people have a legal right to freely express themselves on issues of social or political controversy. He accepts, though, that greater justification is needed for the protection of pornography than for political speech, due to the fact that, in his opinion, no one “is denied an equal voice in the political process, however broadly conceived, when he is forbidden to circulate photographs of genitals to the public at large, or denied his right to listen to arguments when he is forbidden to consider the photographs at his leisure”.²⁸² Nevertheless, Dworkin sees grounds under which the unrestricted availability of pornography may be justified. He supports rights based strategies for this, whereby, even if pornography is damaging to the community as a whole, to censor or restrict it “violates the individual moral or political rights of citizens who resent the censorship”.²⁸³

Dworkin’s standpoint presupposes the value of free expression and thus is against censorship. He also accepts, though, that this presumption may be overruled when what is to be regulated can be demonstrated to cause serious and direct harm. With regard to pornography, Dworkin does not believe this harm is demonstrable, and so does not agree with restrictions. He is prepared to accept that if pornography is to be limited, then restrictions are preferable to censorship.²⁸⁴ Restrictions are still seen as

²⁸¹ Jones, P. *Rights – Issues in Political Theory*. London: Macmillan, (1994), p. 198.

²⁸² Dworkin, R. *A Matter of Principle*. Oxford: Clarendon Press, (1986), p. 335.

²⁸³ *Ibid.* p. 336.

²⁸⁴ *Ibid.* p. 338.

damaging by Dworkin, though, as these not only alter the medium in which pornography is presented, but may also lessen the value that pornography might add to the free marketplace of ideas. Moreover, “restricted publication leaves a certain hypothesis entirely unmade: the hypothesis that sex should enter all levels of public culture”.²⁸⁵ Dworkin also recognises harms to the consumer of pornography that may be caused by restriction, such as inconvenience, expense and embarrassment.²⁸⁶

Thomas Nagel’s work on liberty also falls within the category of rights based approaches. Nagel pays particular attention to the issue of pornography. He begins his analysis by questioning whether the value of our freedom with regard to pornography can be seen in the same light as, for example, freedom from torture.²⁸⁷ Nagel’s conclusion is that the value of both freedoms is, indeed, the same. The rationale is that Nagel regards breaching freedom of expression as breaching a human right, a form of treatment to which no one should be subjected and in the instance of which “the wrongness is not a function of the balance of costs and benefits”.²⁸⁸ If we are to respect a right to freedom and free expression we cannot differentiate between those instances in which we regard the freedom in question to be worthy; if we were to do so, then we would be making value judgements on people’s conception of the good, something which they have a right to choose for themselves.

As was the case with the harm approaches, the issue of the other and self regarding arenas is also relevant in the rights based approaches. Dworkin considers whether pornography should be limited to private consumption. He concludes that there is no evidence to support the argument against publicly displaying pornography. Moreover, if we are permitted to do something, he sees no justification for us not being permitted to do it publicly.²⁸⁹ Nagel also differentiates between the public and private spheres, he regards this distinction as important due to it “keeping disruptive

²⁸⁵ Ibid. p. 342.

²⁸⁶ Ibid. p. 357.

²⁸⁷ Nagel, T. Personal Rights and Public Space. *Philosophy and Public Affairs*. Vol. 24, No. 2, (Spring, 1995), p. 83.

²⁸⁸ Ibid. pp. 84-85.

²⁸⁹ Dworkin, R. *A Matter of Principle*. Oxford: Clarendon Press, (1986), pp. 345-347.

material out of the public arena and protecting private life from the crippling effects of the external gaze".²⁹⁰ He also differentiates between these two arenas with regard to rights. The rights within the private sphere are concerned with our independence and freedom from external control. Within the public sphere the two rights which Nagel considers to be the most important are freedom of expression and political association.²⁹¹

Such a strong focus on free expression leads Nagel to oppose restrictions upon pornography; although accepting that the harm caused by the restriction of pornography would be minimal, as we could all easily survive without it. The issue is that the state has no legitimate grounds under which to legislate on such matters. Thus, irrespective of the irrelevance of the action being restricted, it is the principle of a breaching of our freedom that is important. Nagel regards freedom of expression as having intrinsic value; not only due to its link to freedom of thought, but also due to the fact that its denial brings our integrity into question, which, in turn, is a sign of disrespect for our ability to choose our own life paths.²⁹² In addition, a challenge to our individual autonomy is regarded by Nagel as a breach of our most fundamental rights. He is particularly displeased by the fact that this challenge is often carried out in the name of protecting against offence or insult; with a clear example of this policy being anti-hate speech legislation and the spread of political correctness.²⁹³ Nagel is opposed to such legislation not only because it breaches the right to free expression but also because

To claim the need for such protection of one's beliefs invites only contempt. Willingness to permit the expression of bigotry and stupidity, and to denounce or ignore it without censoring it, is the only appropriate expression of the enlightened conviction that the proper ground of belief is reason and evidence rather than dogmatic acceptance.²⁹⁴

²⁹⁰ Nagel, T. Concealment and Exposure. *Philosophy and Public Affairs*. Vol. 27, No. 1, (Winter, 1998), p. 17.

²⁹¹ Nagel, T. Personal Rights and Public Space. *Philosophy and Public Affairs*. Vol. 24, No. 2, (Spring, 1995), p. 95.

²⁹² *Ibid.* p. 96.

²⁹³ Nagel, T. Concealment and Exposure. *Philosophy and Public Affairs*. Vol. 27, No. 1, (Winter, 1998), p. 24.

²⁹⁴ Nagel, T. Personal Rights and Public Space. *Philosophy and Public Affairs*. Vol. 24, No. 2, (Spring, 1995), p. 98.

With those within the rights based approaches directly tackling the question of whether there are legitimate grounds under which to restrict pornography, it is much easier to draw a conclusion as to what the position of this approach is. It is clear, especially from the works of Dworkin and Nagel, that rights based approaches are opposed to restrictions upon pornography, including restrictions upon public displays.

Implications for Racist Hate Speech

Like the harm based approaches, the rights based approaches prioritise political speech. When considering the issue of free speech, Dworkin is particularly concerned with an individual's right to express "what he honestly believes...on issues affecting how he is governed".²⁹⁵ Thus, we can presume that he places particular importance upon the freedom of political speech. Political speech not only includes individuals' expressing what they believe about how they should be governed; it also provides the community with information regarding their political options. When restrictions are placed upon the speech of political organisations, individuals do not have at their disposal all information regarding how they should be governed.

In addition, Dworkin's discussion of anti-riot laws tackles the issue of political speech that is also hate speech. In this discussion, Dworkin addresses the matter of whether free expression should be limited to mean non-provocative free expression. He concludes that this limitation would invalidate the principle of free expression; as "a man cannot express himself freely when he cannot match his rhetoric to his outrage".²⁹⁶ The fact that such speech may shock the majority is disregarded by Dworkin. He argues that "it is arrogant for the majority to suppose that the orthodox methods of expression are the proper way to speak, for this is a denial of equal concern and respect".²⁹⁷ Dworkin develops this argument further and considers speech that may lead to violence; concluding here that

If a man has a right to speak, if the reasons that support that right extend to provocative political speech, and if the effects of such speech on violence are

²⁹⁵ Dworkin, R. *Taking Rights Seriously*. London: Duckworth, (1977), p. 201.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

unclear, then the government is not entitled to make its first attack on that problem by denying that right.²⁹⁸

Part of the rationale behind this conclusion lies in Dworkin's belief that the speakers' motives are irrelevant when deciding whether he has a right to speak. Alongside his theorising of anti-riot legislation and speech leading to violence, Dworkin's comments on the controversial Danish cartoon issue of September 2005 are illuminating; with him stating that "in a democracy no one, however powerful or impotent, can have a right not be insulted or offended".²⁹⁹

Nagel directly tackles the issue of hate speech, accepting that hate speech may cause harm. He believes, though, that the correct way of dealing with this possibility is counter deliberation, otherwise the victims of hate speech are portrayed as vulnerable, in turn harming their cause. Although the issue of extreme right political organisations' racist hate speech is not addressed by him, such a strong defence of freedom of expression can only lead us to conclude that he would argue for its absolute freedom; especially when considering that besides free expression the right which he regards as most important within the public sphere is freedom of political association. Moreover, he argues that "the liberal ideal is not content with the legal protection of free speech for fascists, but also includes a social environment in which fascists can keep their counsel if they choose".³⁰⁰

It is clear, as was the case with harm based approaches, that restrictions upon extreme right political organisations racist hate speech would not be possible from this perspective.

Radical Feminist Critique

The radical feminists have directly tackled much within Dworkin's work. They are critical of equality only being regarded with respect to neutrality; they argue that this has actually resulted in the speech of inequality being

²⁹⁸ Ibid. p. 202.

²⁹⁹ Dworkin, R. *Even bigots and Holocaust Deniers Must Have Their Say*. The Guardian, Tuesday February 14, 2006.

³⁰⁰ Nagel, T. Concealment and Exposure. *Philosophy and Public Affairs*. Vol. 27, No. 1, (Winter, 1998), p. 25.

protected.³⁰¹ They have used Dworkin's own conception of equality to question how he can disregard the need for restrictions upon pornography, as the harms caused by pornography amount to inequality.³⁰² Another element of Dworkin's work which is reassessed by the radical feminists centres on his acceptance of valid restrictions upon freedom. If direct and serious harm is proven, then restrictions upon the action leading to this would be legitimate. Since the radical feminists claim pornography causes direct and serious harm to women, they could conclude that, even in accordance with Dworkin's own theorising, restriction upon pornography would be valid due to this harm.

Besides reinterpreting some of Dworkin's work to fit their perspective, the radical feminists critique his opposition to restrictions on pornography based on his argument that public condemnation is not sufficient justification for individual liberties to be curtailed; whilst also emphasising that the moral position of the majority may be based on prejudice. Dworkin states that "a man must not be held morally inferior on the basis of some physical, racial or other characteristic he cannot help having".³⁰³ The radical feminist response centres on the fact that it is precisely this kind of prejudice that pornography is based on, with women being portrayed as inferior and subordinate to men. Moreover, in today's pornified world, with pornography represented in every aspect of society, pornography is the moral position of the majority.

Dworkin's anti-censorship stance is also heavily criticised by the radical feminists, in part due to his lack of acceptance of the potency of performative speech acts.³⁰⁴ The acceptance of the potency of speech as an act is vital to understanding the radical feminist viewpoint.³⁰⁵ Andrea Dworkin points to obscenity legislation, which is in line with liberal ideals, in order to validate their stance on restricting speech due to its performative nature. Censorship is not a suppression of ideas. Rather, she argues, it is an act that stops people writing or speaking. Obscenity legislation censors writing, thus

³⁰¹ MacKinnon, C.A. *Only Words*. Cambridge, Harvard University Press, (1993), pp. 70-71.

³⁰² MacKinnon, C.A & Dworkin, R. *Pornography – An Exchange*. in Cornell, D. (ed.) *Feminism & Pornography*. Oxford: Oxford University Press, (2000), p. 121.

³⁰³ Dworkin, R. *Taking Rights Seriously*. London: Duckworth, (1977), p. 250.

³⁰⁴ Fiss, O.M. *The Irony of Free Speech*. Cambridge: Harvard University Press, (1996), p. 13.

³⁰⁵ This will be further developed in Chapter 4.

treating writing as a speech act rather than purely as an idea, which liberalism argues should not be restricted. Thus, even within the liberal framework, suppression of pornography need not necessarily be invalid.³⁰⁶

The work of Jones faces similar criticisms to those encountered in the analysis of the harms based position. The issues of morality, offence and disrespect are disregarded by the radical feminists, as they do not include them in their definition of pornography, as elaborated in Chapter 1. Both the respect and offence principles disregard the issue of harm; it is not due to extreme sensibilities that women are harmed by pornography, but due to the tangible effects that spawn from it. Although Jones accepts that the right to free speech should be coupled with a moral responsibility not to abuse it, he disregards legal restrictions as too stringent and perilous, as valid speech could mistakenly be silenced.³⁰⁷ The radical feminists argue, though, that the nature of such speech and its history means that women are already at a disadvantage. Thus, they seek a more active approach to redressing these inequalities than Jones' attachment of moral responsibility to freedom of speech.

Nagel's work, meanwhile, leads to some more disturbing conclusions from the radical feminist perspective. Nagel's intuition that we cannot possibly reach a common understanding of sexual life seems reasonable. Nagel, though, seems to disregard the influence of pornography in the development of many individuals' sexual character. Our sexual lives are not developed in a void, they are developed within society and the influence of society is clear. It would seem difficult to deny that the widespread portrayal of women in a certain way, in a way that is derogatory and thus adds to the historic inequalities of women within society, has an influence upon a large number of people. Much of Nagel's landscape of sexual fantasies is framed by pornography; as opposed to it being a representation of the people who

³⁰⁶ Dowkrin, A. *Against the Male Flood: Censorship, Pornography and Equality*. in Mashchke, K.J. (ed.) *Gender and American Law – Pornography, Sex Work and Hate Speech*. New York: Garland Publishing Inc., (1997), pp. 70-74.

³⁰⁷ Jones, P. *Respecting Beliefs and Rebuking Rushdie*. in Horton, J. (ed.) *Liberalism, Multiculturalism and Toleration*. London: Macmillan, (1993), p. 132.

produce pornography and their sexual fantasies. Nagel leaves no room for restriction within this realm, stating:

If some men get their kicks by watching movies of women with big breasts engaged in fellatio, and if others get theirs by watching depictions of gang rape or flogging or mutilation, this really should not give rise to a claim on anyone's part to be surrounded by, or even included in, such fantasies. We have no right to be free of the fantasies of others, however much we may dislike them.³⁰⁸

He denies that the feeding of our sexual socialisation with such violent material may have harmful implications when those watching the pornography implement it in their sexual lives; not necessarily in the instance of sado masochism between consenting adults, but gang rape and mutilation. It has been argued by some that the appeal of such pornography is the fact that it is fantasy, that individuals are drawn to it as they would not want to perform such acts in reality.³⁰⁹ This claim, though, is countered by the radical feminists, who argue that the sexual crimes that are committed against women reflect these alleged fantasies.³¹⁰

The counter arguments from the radical feminist perspective relating to restriction upon the racist hate speech of extreme right political organisations are similar to those relating to pornography. Racist hate speech limits the freedom and equality of its victims; it is silencing speech; it limits the access that its victims have to the deliberative arena, either through questioning the legitimacy of the victim's speech or by restricting that speech through intimidation. Thus, the response to Dworkin would be that, in order to achieve greater freedom and equality, the racist hate speech of the extreme right should be restricted. In addition, Dworkin's analysis of speech which leads to violence is problematic. Dworkin accepts in this analysis that "I have no right to burn your house",³¹¹ with him clearly differentiating between speech and act. According to performative speech theory, though, the difference between speech and act is not as pronounced as he suggests. Similarly, the response to Nagel's calls for counter deliberation as the best way to tackle hate speech centres on him underestimating the harm that is

³⁰⁸ Nagel, T. Personal Rights and Public Space. *Philosophy and Public Affairs*. Vol. 24, No. 2, (Spring, 1995), p. 106.

³⁰⁹ Spector, J. (ed.) *Prostitution and Pornography – Philosophical Debate About the Sex Industry*. Stanford: Stanford University Press, (2006), p. 287.

³¹⁰ See: MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993); Dworkin, A. *Pornography – Men Possessing Women*. London: The Women's Press Ltd., (1984).

³¹¹ Dworkin, R. *Taking Rights Seriously*. London: Duckworth, (1977), p. 202.

caused by such speech. He does not take into consideration that the nature of the harm caused is to silence the victims. Hence, the power to counter deliberate of the victims will be less than that of the oppressors. Counter deliberation would be an ideal in the instance of all our speech carrying the same weight. As this is not the case, though, legislation is necessary.

3.2 Autonomy Rationale

The second rationale sustaining liberal arguments in favour of freedom of speech is autonomy. The autonomy stance is exemplified by communitarian/perfectionist approaches and the work of Joseph Raz in *The Morality of Freedom*.

Communitarian/Perfectionist Approach

Raz's communitarian view of rights leads to substantially different conclusions regarding pornography and the racist hate speech of extreme right political organisations when contrasted with neutrality focused liberals. Raz views Dworkin's conception of liberty as regarding liberty as instrumentally valuable, due to it depending on other values, namely equality. Raz, though, argues for liberty as intrinsically valuable. Otherwise, as there are various degrees of liberties, he believes some liberties would be valueless.³¹² Doctrines of neutrality fall outside of Raz's theorising. He argues that neutrality is not always possible, and that it is not always defensible. He sees neutrality, at times, as acting unfairly: for example, when dealing with two individuals one of whom has a clear advantage over the other.³¹³ The doctrine Raz promotes is one of moral pluralism, which "asserts the existence of a multitude of incompatible but morally valuable forms of life",³¹⁴ coupled with a promotion of autonomy, in order for individuals to freely discover the conception of the good they wish to pursue. For Raz, neutrality does not play a role in this doctrine, as "it is the goal of all political action to enable individuals to pursue valid conceptions of the good and

³¹² Raz, J. *The Morality of Freedom*. Oxford: Clarendon Press, (1986), pp. 13-17.

³¹³ Ibid. p. 114-121.

³¹⁴ Ibid. p. 133.

discover evil or empty ones”.³¹⁵ Although accepting that political action should be ‘value-blind’, Raz couples it with government’s ability to act morally, extending his argument to declare that states cannot enforce a ‘wrong morality’,³¹⁶ as issues regarding valuable forms of life do not only affect the individual but society as a whole. Such a stance would seem more suited to issues of power and domination, the acceptance of different treatment for people in different circumstances could be legitimate grounds from which to redress historic social inequalities.

Despite Raz’s view of liberty as intrinsically valuable, one must not disregard the fact that he aligns himself with liberals who perceive autonomy as “the core of the liberal concern for liberty”.³¹⁷ He does not, however, regard autonomy to be a right, as the value to an individual of being autonomous is not sufficient to hold the community at large to the extensive duties that would be involved in it being a right. Raz regards autonomy as a moral ideal.³¹⁸ Raz links autonomy to freedom due to his belief in autonomy requiring morally acceptable options for individuals to choose from. “Autonomy is valuable only if exercised in pursuit of the good”,³¹⁹ our conception of freedom is bound to what we consider worthwhile. He also links autonomy to collective goods because autonomy is only possible due to the background social conditions which facilitate it. This social context eliminates any possible conflicts between individual autonomy, or liberty, and the needs of others. Personal autonomy is central to Raz’s conception of freedom, with him regarding autonomy-based conceptions of freedom as the moral foundations for the *harm principle*.³²⁰ Alongside this emphasis on autonomy, Raz also points to toleration, which he regards as the restraint from harming someone whom one believes deserves to be harmed.³²¹ From these concerns with toleration and autonomy develops a positive notion of liberty, Raz believing that our duties towards others extend beyond non-

³¹⁵ Ibid.

³¹⁶ Ibid. pp. 135-139.

³¹⁷ Ibid. p. 203.

³¹⁸ Ibid. p. 247.

³¹⁹ Ibid. p. 381.

³²⁰ Ibid. p. 400.

³²¹ Ibid. pp. 401-403.

coercion. People also have duties to foster the capacities required for autonomy and an adequate range of options for individuals to achieve autonomy.³²² In line with this positive conception of freedom, not all restrictions placed upon individuals' actions are a breach of freedom. Only those restrictions which limit our ability to pursue our more pervasive goals, those related to our autonomy, breach our freedom.

Implications for Pornography

The issue of pornography is not addressed directly by Raz. However, various elements of his theory can be applied to it. A principal neutralist liberal argument used to oppose restrictions upon pornography is that it falls within the private sphere. According to Raz, though, there is not as rigid a distinction between the public and private domains as there is for neutralist liberals. Moreover, freedom of speech is placed in the public domain, due to Raz's focus on public goods and the role of free speech as a public good.³²³ Doctrines of neutrality are also used to oppose restrictions upon pornography. Raz, though, disregards these doctrines, neither accepting that neutrality is always possible nor the best option. Thus, Raz's perspective could be used to counter freedom for pornography, especially when considering that Raz, when regarding autonomy-based freedom, does not believe that it extends to "the morally bad or repugnant".³²⁴ In addition, under Raz's conception, "autonomy requires a public culture...consistent with a tasteful rather than a vulgar and offensive environment",³²⁵ to which could be added his concerns about discrimination based on sex, leaving conceptual room for pornography to be limited. There are, though, a number of issues which are very subjective, such as what is to be considered vulgar or offensive.

Implications for Racist Hate Speech

³²² Ibid. p. 408.

³²³ Ibid. p. 256.

³²⁴ Ibid. p. 411.

³²⁵ Ibid. p. 422.

Issues of free political speech are directly tackled by Raz. Although Raz accepts that speech may be restricted in certain circumstances,³²⁶ the primacy of political speech is clear when he defines the boundaries for freedom of speech:

The precise boundaries of freedom of speech are notoriously controversial, but the core is and always was the protection of political speech and of the free exchange of information which is of public interest. It benefits all those who are subject to that political system. Thus while political theorists often highlight the protection for the individual dissident which it provides, in practice its primary role has been to provide a collective good, to protect the democratic character of society.³²⁷

Hence, one could assume that the speech rights of political organisations would be equally protected. When regarding the racist hate speech of extreme right political organisations, though, one could argue that there is theoretical room for restrictions to be made. The element of “protecting the democratic character of society” could be seen as threatened by the large undemocratic elements within such organisations. In addition, the fact that such speech is racist is a fact that Raz would consider particularly concerning. He argues that special protection should be extended to those being discriminated against on the basis of their sex or race, as this sort of discrimination is particularly damaging due to it distorting individuals’ “ability to feel pride in membership in group identification which is an important element in their life”.³²⁸ Another element within Raz’s theory which could be seen as legitimating restrictions upon the racist hate speech of extreme right political organisations is that his conception of the *harm principle* extends to include extreme levels of offence, as this may limit our options and projects and thus our autonomy. In addition, government has a duty to promote autonomy, with coercion being permissible according to his conception of the *harm principle*.³²⁹

From this conception of the *harm principle* and the issue of discrimination on the basis of race, one could begin to find room for legitimate restrictions to be placed upon racist hate speech. However, the primacy of political speech cannot be denied. My intuition would be that hate

³²⁶ Ibid. p. 184.

³²⁷ Ibid. pp. 253-254.

³²⁸ Ibid. p. 253.

³²⁹ Ibid. pp. 413-416.

speech could be regulated, although the fact that the source of this particular hate speech is a political organisation somewhat complicates the matter. Despite what one's feelings towards such political organisations and their speech may be, the fact remains that they are political organisations. Thus, not only is their speech political but their participation in the political arena, regardless of their ideology, is part of the democratic process. With Raz's focus on protecting the democratic character of society and the primacy of political speech with respect to freedom of speech as a right, I would conclude that the racist hate speech of extreme right political organisations would be protected.

Radical Feminist Critique

Raz seems the most appealing theorist from the radical feminist perspective. The addition of offence as a separate ground for legitimate restrictions on freedom and the possibility of placing pornography within his realm is a significant move towards the radical feminist arguments regarding performative speech and the harm that it can cause. However, the radical feminists have gone to great lengths to remove pornography from the realm of offence, and therefore an alignment with this stance would prove difficult. The fact that the racist hate speech of political organisations would still be protected, though, is problematic.

2.3 Conclusion

From this assessment of the three different liberal approaches to freedom of speech, several conclusions may be drawn. When considering neutrality based approaches the radical feminist position does not appear illiberal per se. Radical feminists think freedom of speech and rights are important, but, like liberals, they believe that these freedoms need to be limited when their exercise prevents others exercising them. In turn, they argue liberals do not fully accept the degree of harms they recognise. In particular, they find a concern for harms derived from domination and speech lacking in the liberal position.

The autonomy rationale seems the most suited to the radical feminist stance. This approach allows for greater room for restrictions upon speech than the other two approaches. Despite the autonomy rationale being more suitable for the radical feminist position, though, a significant issue remains. It is apparent from the three perspectives assessed that although these could be stretched to include some restrictions upon pornography, the case of racist hate speech of extreme right political organisations is very different. The primacy that political speech is given within liberalism means that restrictions could not be placed upon it.

Another issue that liberals from all three approaches would find with the radical feminist position relates to the harms they identify as caused to those in the making of pornography, those who feature in pornographic images. Liberal contract theory would conclude that as those involved had consented, in the instance of them being able to consent, to the material being produced, then they had also agreed to what would happen to them in the process of production.³³⁰

The following chapter will assess republican conceptions of freedom, outlining the prominent approaches and assessing them from the radical feminist perspective. The republican conception of freedom as non-domination would seem to fill the gaps that the radical feminists find with the liberal position. The possibility of aligning the radical feminist position with republicanism will thus be explored in this chapter.

³³⁰ Liberal contract theory is derived from social contract ideals that indicate that it is through individual consent that individuals grant their freedom to others or institutions. This is a central part of liberal theory and may be found in modern and classical liberal theory. For examples see: Hobbes, T. *Leviathan*. London: Penguin Classics, (1981); Laslett, P. (ed.) *Locke – Two Treatises of Government*. Cambridge: Cambridge University Press, (2009); Rawls, J. A. *Theory of Justice*. Cambridge: The Belknap Press of Harvard University Press, (1971).

Chapter Three

Republicanism and Freedom of Speech

The principal aim of this chapter is to develop the alignment, in accordance with the definition developed in Chapter 1, between republican theory and the radical feminist stance on pornography and racist hate speech. Radical feminists seek to critique the ideological dominance of liberalism by highlighting the flaws which they perceive as present in the ideology. The prominent flaws they point to are a lack of concern with issues of power and domination. Republican theory, meanwhile, has in recent times gained renewed attention due to its own critique of liberalism; liberalism's ideological dominance being brought into question due to social and political failings in the Western world. Contemporary republicans, like radical feminists and critical race theorists, aim to highlight the flaws which they perceive in liberalism.

In this chapter I assess the republican stance on freedom and freedom of speech, with a particular focus on the work of Phillip Pettit and Cass Sunstein. Through this assessment I shall demonstrate how despite the fact that republicanism has often been heavily criticised by feminists, contemporary republican theory, through its critique of liberalism, can be seen as an underpinning and conceptualisation of the radical feminist stance. Despite the radical feminists not being anti-liberal, if that is taken to mean disregarding rights, as discussed in Chapter 2, their stance can be furthered by republican theory. Republicanism provides their perspective with not only broader appeal but also further legitimacy.

The republican conception of freedom as non-domination centres on issues of power and domination. Thus, the initial concerns that the radical feminists find with liberalism are seemingly absent. In addition, unlike liberal theory, republicanism is more willing to accept, and has within its own ideology, performative speech acts. Republicanism, meanwhile, unlike the radical feminist stance, does not have as strong a focus on harm.

What I aim to do through the alignment of these two perspectives is articulate a concept of freedom which I believe to be present in the radical

feminist stance despite it not being stated. Although the radical feminist concerns centre on issues of liberty, they devote little time to developing this concept. Moreover, their conception of freedom is heavily influenced by their historic ties with liberalism. At the same time, the radical feminist stance will be used to inform the republican perspective with its concerns over harm. In addition, although there are republican theorists who argue for restrictions to be placed upon pornography, with some also calling for narrow restrictions to be placed upon certain kinds of hate speech, republicanism does not offer a concise definition for either of these. Through the radical feminist and CRT definitions of pornography and racist hate speech, restrictions upon these forms of speech argued for by republicans can be further advanced. Any possible legislation based upon their recommendations will only be possible to implement through such concise definitions of these forms of speech as those developed in Chapter 1.

The first section of this chapter will assess the republican position on freedom. Although freedom as non-domination will be focused upon, as it is the republican conception of freedom being applied in this thesis, a brief outline of republican freedom as autonomy will also be provided. The second section will assess the republican position on freedom of speech. The third section identifies feminist criticisms of republican theory; the fourth section readdresses these criticisms through, predominantly, the work of Hannah Arendt.

3.1 Republican Freedom

Despite the traditional association between liberalism and liberty, one must not forget the close proximity that there also is between republicanism and liberty; with some even arguing that “liberty is the soul of republican institutions”.³³¹ The concept of liberty advocated by each approach, though, is vastly different; “the heart of the republican approach lies in a different conception of freedom to the liberals”.³³² There are, however, considerable

³³¹ Fontana, B. (ed.) *The Invention of the Modern Republic*. Cambridge: Cambridge University Press, (1994), p.67.

³³² Bellamy, R. *Liberalism and Pluralism – Towards a Politics of Compromise*. London: Routledge, (1999), p. 120.

differences between republicans when it comes to the concept of freedom. Besides those republicans who consider freedom as non-domination, there are also those who regard freedom as autonomy. Within contemporary republican theory this divide between freedom as non-domination and freedom as autonomy has been separated into the neo-Roman and neo-Athenian camps, respectively.

Freedom as Non-Domination

Philip Pettit's variant of republicanism is derived from concerns he has with liberal conceptions of liberty, concerns which are parallel to those found in the radical feminist critique of liberalism. Pettit's concerns centre on a belief that under liberal conceptions of freedom, an individual may be dominated by another and yet still be considered free; as long as the individual is not being actively interfered with. In accordance with Pettit, an individual in such a position would not be considered free, as the focus of Pettit's conception of liberty is non-domination. For Pettit, being un-free consists of "being subject to arbitrary sway: being subject to the potential capricious will or the potential idiosyncratic judgement of another".³³³ Freedom is seen as the absence of such arbitrary interference, otherwise referred to as domination. Hence, Pettit's conception of freedom is one of freedom as non-domination, a conception that is aligned with the thoughts of classical republican theorists such as Cicero and Machiavelli. This conception of liberty not only challenges the dominant liberal conceptions of freedom, it also goes beyond Isaiah Berlin's *Two Concepts of Liberty*.³³⁴

According to Berlin's taxonomy, *negative* liberty is defined as "the area within which man can act unobstructed by others";³³⁵ whilst *positive* liberty is defined as "the wish on the part of the individual to be his own master".³³⁶ Thus, we can deduce that, according to Berlin, *positive* liberty is mastery over the self, whilst *negative* liberty is absence of interference by

³³³ Pettit, P. *Republicanism: A theory of Freedom and Government*. Oxford: Clarendon Press, (1997), p.5.

³³⁴ Berlin, I. *Four Essays on Liberty*. Oxford: Oxford University Press, (1969).

³³⁵ *Ibid.* p. 122.

³³⁶ *Ibid.* p. 131.

others. Pettit's conception of freedom, according to Berlin's taxonomy, is a *negative* notion of freedom, as freedom is possible only in the absence of conditions that may lessen our capacity to act. Although Pettit accepts that within Berlin's taxonomy his conception of freedom would be a *negative* one, he sees Berlin's taxonomy as flawed, arguing that there is a third, a republican, conception of freedom.³³⁷ As opposed to freedom from interference, as is the case with liberal freedom, Pettit's conception is one of freedom from mastery.³³⁸

Pettit argues that republican conceptions of liberty have been classified as *positive* due to the centrality of democratic participation within them. Although he does not deny the primacy of democratic participation in republican conceptions of liberty, he believes the predominant focus is on "avoiding the evils associated with domination".³³⁹ Pettit validates this stance by arguing that the republican tradition, in its different variants, "is unanimous in casting freedom as the opposition of slavery",³⁴⁰ with slavery being characterised as domination, not interference.

Pettit's criticism of *positive* liberty is based on his argument that there are no guarantees for self-mastery within this conception. The core of his criticism, though, concentrates on *negative* liberty. Pettit does not believe that a lack of interference is sufficient to secure freedom, as one may still be dominated yet not interfered with, as in the case of a *non-interfering master*. Pettit's arguments as to why non-interference is incongruous with freedom are various, many centring on issues of security. If an individual is dominated yet not being interfered with, this individual has no security over her freedom, as her freedom may be curtailed at any point. This lack of security, in turn, may lead the individual to self-limit her options in an attempt to placate the *non-interfering master*, in an attempt to gain security. This argument results in Pettit believing that it is the capacity to interfere with the individual that is a concern. In addition, Pettit argues that in a dominant relationship, the nature

³³⁷ Pettit, P. *Republicanism: A theory of Freedom and Government*. Oxford: Clarendon Press, (1997), p.18.

³³⁸ Ibid. p.22.

³³⁹ Ibid. p. 7.

³⁴⁰ Ibid. p.31.

of the relationship will become common knowledge, something which, in turn, leads to the one who is dominated not being able to “enjoy the psychological status of an equal”.³⁴¹ In the instance of not being an equal, the individual will not be able to fully participate in the democratic process.

Pettit’s conception of liberty deviates from Berlin’s *negative* liberty in yet another way. Pettit believes we can be interfered with and still be considered free, in instances when “the interference is not arbitrary and does not represent a form of domination: when it is controlled by the interests and opinions of those affected, being required to serve those interests in a way that conforms with those opinions”.³⁴² An example of such an instance would be *just laws*, something that Pettit and the different variants of republicanism recognise. In classical conceptions of *negative liberty*, such as those found in the works of Hobbes and Bentham, all interferences and, in turn, all laws, curtail our freedom. In republicanism, though, unlike in some variants of liberalism, laws and freedom need not necessarily be opposed to one another. Republicans differentiate between just and unjust laws, arguing that just laws do not limit our freedom; that they in fact add to it by ensuring that we are not caught in a trap of domination. It is through this aspect of their conception of freedom that republicans introduce democracy as necessary for liberty to be achieved, as “only universal suffrage and the widespread participation of citizens in political life can ensure that the laws will be just, instead of serving particular interests and private concentrations of power”.³⁴³

This conception of freedom as non-domination appears to be in line with the radical feminist stance. A liberal conception of freedom did not placate the radical feminist concerns over domination; the liberal concern with neutrality merely entrenching status-quo inequalities in society. A conception of freedom as non-domination, though, would seem to underpin these concerns. The centrality of power and domination within the conception of freedom means that there could not be an instance of one being considered free when being dominated by another. To curtail the

³⁴¹ Ibid. p.64.

³⁴² Ibid. p.35.

³⁴³ Larmore, C. A Critique of Philip Pettit’s Republicanism. *Society, Political and Legal Philosophy*. Philosophical Issues 11, (2001), p.232.

action of one in the instance of that action leading to the domination of another would be considered legitimate. In such a scenario, if pornography and racist hate speech were demonstrated to promote domination, then to curtail the act which was leading to that domination would not be a breach of freedom, moreover, it would actually be facilitating freedom. Central to this argument is that republicans “see debate about the legitimacy of interference per se as misconceived. They concentrate on providing a non-domination environment where citizens can lead secure lives”.³⁴⁴

Although neo-Roman republicans do not deny that liberty could be curtailed through interference, with harm being a form of interference, the concern with domination is a concern with one being vulnerable to being interfered with. In the case of pornography being accepted as an instance of domination, the capacity for men to interfere with women would be in place. As with the *sleeping master*, the result would be women reacting in submissive ways. Even if it were accepted that no direct harm was caused to women either in the production of pornography or as a result of attacks on women by men watching pornography, a conception of freedom as non-domination could still be used to legitimise arguments in favour or restricting pornography. Pornography would still be producing an environment where women think of themselves as subordinate. The reality of society has historically been that men are in a stronger position to women. As a regular rule, men have held the vast majority of positions of power. Hence the conditions for arbitrary interference by men over women are already in place. The promotion of this hierarchy through images of women as subordinate in pornography would therefore seem to allow for it to be justifiably labelled as an instance of domination. Similarly, in the case of racist hate speech the same could be said of the dominant majority over historically oppressed minorities as can be said of men over women.

There is another element of the concept of freedom as non-domination which overcomes one of the issues found in the radical feminist assessment of the liberal position, the issue of consensual contract. Pettit

³⁴⁴ Bellamy, R. *Liberalism and Pluralism – Towards a Politics of Compromise*. London: Routledge, (1999), p. 120.

indicates a traditional republican concern present in his theory, the opposition to the slave contract. Pettit is aware that some relationships in which domination is present may have originated in consent through contract. Pettit, though, is critical of the liberal position on contractual consent, arguing that “whether a relationship sprang originally from a contract or not, whether or not it was consensual in origin, the fact that it gives one party the effective capacity more or less arbitrarily in some of the other’s choices means that the person dominates or subjugates the other”.³⁴⁵ Such a stance would override the problem that arose from the liberal perspective regarding people consenting to perform in pornography.

Freedom as Autonomy

In neo-Athenian republicanism, the most renowned advocates of which are Hannah Arendt and Michael Sandel, participation in institutions of a self-governing democratic polity is seen as providing individuals with a particular form of liberty, and regarded as helping individuals realise a higher degree of self mastery.³⁴⁶ According to this stance “being free means participating freely in the self-governing community”.³⁴⁷ When contrasting this ideal to liberal freedom, republicans argue that rather than allowing a person full control over their own domain of action, “they allow each person partial control over the domain of everyone’s action”.³⁴⁸ As a result, in contrast to the neo-Romans, neo-Athenian republicans stress conformity to a singular ideal of human excellence.³⁴⁹ There is a greater concern for personal freedom for the neo-Romans.

This conception of freedom considers freedom as inherent in action; with the performance of the act itself, as opposed to the end product, being what is regarded as crucial.³⁵⁰ Hence this position is regarded as holding a

³⁴⁵ Pettit, P. *Republicanism: A theory of Freedom and Government*. Oxford: Clarendon Press, (1997), pp. 61-62.

³⁴⁶ Maynor, J.W. *Republicanism in the Modern World*. Cambridge: Polity, (2003), pp. 11-12.

³⁴⁷ *Ibid.* p. 13.

³⁴⁸ Pettit, P. Reworking Sandel’s Republicanism. *The Journal of Philosophy*. Vol. 95, No. 2 (Feb., 1998), p. 82.

³⁴⁹ Maynor, J.W. *Republicanism in the Modern World*. Polity: Cambridge, (2003), p. 12.

³⁵⁰ Arendt, H. Freedom and Politics. in Miller D. (ed.) *The Liberty Reader*. London: Paradigm Publishers, (2006), pp. 64-68.

positive conception of liberty. The focus on action is derived from the idea of the active republican citizen and the need for civic virtues.³⁵¹ The possibility of action, specifically political action, is regarded by these republicans as imperative for society. The focus is not only on action but on possibility itself, with what is possible for humans to achieve. Particular attention is paid to how we can fully realise our capacities, or at least those capacities which republicanism attribute to man. The performance of worthy acts is a primary concern for republicans when regarding capacities.

For the republican, an act is not worthy simply by virtue of being instrumental in an obvious utilitarian sense. Nor is it worthy because it conforms to an abstract notion of a categorical imperative. Instead, actions are worthy in precisely the degree to which they fulfil the two tasks of sustaining the virtue of the actor as *well as* enhancing that public space which makes these acts possible.³⁵²

It is through these worthy acts that the ‘republic’ comes into being. These acts not only display actor’s uniqueness, they also create the public space necessary for worthy acts to be possible, as the actor is through the act opening herself to peer assessment and thus a public space is created. It is through these acts in the public space that virtuous citizens emerge, as the citizens are here dedicating themselves to something more than just their private desires. This progression to virtuous citizenship cannot take place if only one actor is involved; through a larger community the citizens become interdependent, hence the emergence of the republic.

Group Domination, Social Domination, Structural Domination

A possible issue for the application of the republican conception of freedom as non-domination, as outlined above, to the case of women and ethnic minorities is what has been described as the individualistic framework of Pettit’s position; which, in turn, “pays little attention to the social forces that enable such domination”.³⁵³ In addition, it has also been argued that Pettit’s account does not take into account the possibility of structural domination.³⁵⁴

³⁵¹ Sandel, M.J. *Democracy’s Discontent – America in Search of a Public Philosophy*. Cambridge: The Beknap Press of Harvard University, (1996), pp. 5-6.

³⁵² Geise, P. G. Republican Ideas and Contemporary Realities. *The Review of Politics*. Vol. 46, No. 1, (Jan 1984), p.25.

³⁵³ Hirshmann, N.J. *The Subject of Liberty – Towards a Feminist Theory of Freedom*. Princeton: Princeton University Press, (2003), p. 27.

³⁵⁴ Richardson, H.S. Republicanism and Democratic Injustice. *Politics, Philosophy & Economics*. Vol. 5, Issue 2, (2006), p. 178.

A focus on the individual and a disregard for social forces and structural issues could prove problematic when attempting to apply this concept of domination to the case of women and ethnic minorities, as these are groups, and the domination is, in part, derived from social norms and structural elements. These issues, though, have been readdressed by republicans who have taken up Pettit's position.

Cécile Laborde in her outline of critical republicanism accepts that social norms can result in domination. As an example, she identifies sexism; arguing how despite women having an equal status as citizens, they are socially dominated by unfair labour markets, unequal pay and objectification.³⁵⁵ Furthermore, she argues that for non-domination to be achieved, both socio-economic, in the form of substantive opportunities, and symbolic and discursive, in the form of dominating social norms and ethnocentric rules, obstacles to full citizenry participation must be removed.³⁵⁶ Such a position is tailored towards the inclusion of historically excluded groups, in particular women and ethnic minorities. Laborde identifies different ways in which women may be dominated, "both by being denied the opportunity to develop their own perspective (autonomy denial) and by being led to adopt attitudes of subservience, self-denial, and servility, which make them vulnerable to further domination (autonomy-dismissal)".³⁵⁷ The recognition of the possibility for women to be dominated through being led to adopt particular attitudes about themselves seems to be in line with the case of pornography and the radical feminist concerns with it.

Marilyn Freedman, meanwhile, suggests that Pettit's concept of domination may have a group-based character, as the domination to which someone is exposed is "like that to which others of her group are also exposed".³⁵⁸ Freedman takes the example of male domination of women to develop this point. She suggests that "male domination as a social problem is not merely the aggregate result of individual men engaging in acts of

³⁵⁵ Laborde, C. *Critical Republicanism – The Hijab Controversy and Political Philosophy*. Oxford: Oxford University Press, (2008), pp. 16-17.

³⁵⁶ *Ibid.* p. 18.

³⁵⁷ *Ibid.* p. 154.

³⁵⁸ Laborde, C. & Maynor, J. (eds.) *Republicanism and Political Theory*. Oxford: Blackwell Publishing, (2008), p. 250.

domination of individual women. Instead male domination is a structural and institutionalized feature of a whole society”.³⁵⁹ In order to tackle such domination, in line with Pettit’s account, she suggests the reform of institutions that reward or promote male domination.

The issue of structural domination is also tackled by republicans. Richard Bellamy expresses concern over “structural and institutional contexts that produce inequalities in power relations, which in turn lead to unjust distributive patterns”.³⁶⁰ Bellamy highlights this as a concern due to economic domination undercutting civic freedom. Laborde also identifies structural and institutional features that may limit freedom as non-domination.³⁶¹ In addition, Jennifer Einspahr has taken a republican conception of freedom as non-domination and extended it into a feminist account of structural domination in order to assess the possibility of group domination.³⁶²

These developments of Pettit’s conception of domination seem to override the problems that may have been faced by what was described above as Pettit’s individualistic framework, thereby maintaining the possibility of aligning the republican conception of freedom as non-domination with the radical feminist stance.

3.2 Republican Freedom of Speech

The republican conception of freedom as non-domination seems parallel to the radical feminist position. To ascertain an alignment, though, republican views regarding freedom of speech must be assessed. Unfortunately, “republican scholars have paid limited attention to such issues”,³⁶³ which is not to say, though, that no work is to be found within the republican camp on freedom of speech. Moreover, within the republican conception of freedom

³⁵⁹ Ibid. p. 256.

³⁶⁰ Bellamy, R. Being Liberal with Republicanism’s Radical Heritage. *Res Publica*. Vol. 8, (2002), p. 272.

³⁶¹ Laborde, C. *Critical Republicanism – The Hijab Controversy and Political Philosophy*. Oxford: Oxford University Press, (2008), p. 152.

³⁶² Einspahr, J. Structural Domination and Structural Freedom: a Feminist Perspective, *Feminist Review*, Vol. 94, (2010), p. 4.

³⁶³ Redish, M. H. & Lippman, G. Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications. *California Law Review*. Vol. 79, No 2, (Mar., 1991), p.269.

and the issue of domination itself, matters relating to speech are to be found; some regard domination as most commonly manifested when groups or individuals are denied a voice in decisions governing their lives.³⁶⁴

Within civic republicanism, one finds elements related to the issue of free speech; as well as mentions of pornography, hate speech and political speech. The theories of Alexander Meiklejohn lead to arguments for the protection of all political speech. Meiklejohn regards the members of the political community, as opposed to elected representatives, as the “true governors in a republican society”.³⁶⁵ As a result, the members of the community should have as much information as possible available to them; “the government cannot deny the people the right to express and hear those political ideas, attitudes, or beliefs that they choose because to do so would be to interfere with their responsibility as citizens to govern themselves”.³⁶⁶ Meiklejohn, though, also includes in his conception of political speech: art, literature and science, “because such expressions ultimately make people better citizens and therefore better voters”.³⁶⁷ This argument progresses into the speech-protective versions of civic republicanism, under which the expression of viewpoints relevant to the political community may not be restricted. “Only that speech necessary solely for individual development or private use is excluded from protection”.³⁶⁸

The communitarian determinative model of civic republicanism, on the other hand, focuses on the importance of communitarian values; it has been argued that only speech in congruence with these values should be protected.³⁶⁹ Redish and Lippman argue that both these strands of civic republicanism “undervalue speech because they ignore the degree to which individualism and intellectual pluralism underline the value of free

³⁶⁴ Bellamy, R. *Liberalism and Pluralism – Towards a Politics of Compromise*. London: Routledge, (1999), p. 122.

³⁶⁵ Redish, M. H. & Lippman, G. Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications. *California Law Review*. Vol. 79, No 2, (Mar., 1991), p.270.

³⁶⁶ Stern, P. G. A Pluralist Reading of the First Amendment and Its Relation to Public Discourse. *The Yale Law Journal*. Vol. 99. No. 4, (Jan., 1990), p.930.

³⁶⁷ Redish, M. H. & Lippman, G. Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications. *California Law Review*. Vol. 79. No 2, (Mar., 1991), p.292.

³⁶⁸ *Ibid.* p.270.

³⁶⁹ *Ibid.*

expression”.³⁷⁰ The primary reason for this criticism lies in their belief that civic republican theories ignore the importance of neutrality when regarding speech; as a value structure is imposed upon the community under these theories, making void the marketplace of ideas, since the truth is presupposed by the theory. Sunstein, though, disregards this criticism, arguing that republican theorists do not impose a view upon society, as they “require public-regarding justifications offered after multiple points of view have been consulted and genuinely understood”.³⁷¹

Despite a lack of focus from republican theorists on issues regarding free speech, one of the central tenets of republican theory, an emphasis on deliberation and the deliberative process within society, may be seen as directly dealing with it. In this context, deliberation refers to the citizenry engaging in a political discussion regarding how it should, as a whole, proceed. In addition, the other three tenets which make up the core beliefs of republicanism can also be regarded as furthering the deliberative process. The first of these tenets is political equality, which is regarded as enhancing the efficiency and legitimacy of deliberation. Political equality means that all within the political community have access to the political process, with considerable differences in the political influence of individuals seen as problematic.³⁷² The second tenet, universalism, ties in with political equality through its rationale of a common good. Whilst the third tenet, citizenship, guarantees rights of participation in the political process.

Another element of republicanism which aids the alignment with the radical feminist position is a willingness to accept the potency of performative speech acts. Despite not going as far as the radical feminists in accepting that some words are, in fact, acts, Sunstein accepts that “some words actually amount to a way of performing independently illegal acts”.³⁷³ Sunstein further develops this argument through the example of racial discrimination. He uses the example of discrimination through speech in the

³⁷⁰ Ibid. p.271.

³⁷¹ Sunstein, C. R. Beyond the Republican Revival. *The Yale Law Journal*. Vol. 97, No. 8 Symposium: The Republican Civic Tradition, (Jul., 1998), p.1575.

³⁷² Ibid. p.1541.

³⁷³ Sunstein, C.R. *Democracy and the Problem of Free Speech*. New York: The Free Press, (1993), p. 125.

work place, stating that the utterance of words such as *I'll fire you unless you sleep with me* amount to as act of harassment, as opposed to merely leading to harassment. From this example he goes on to argue that similar utterances referring to race would also amount to acts of harassment.³⁷⁴ Such an argument is parallel to that made by the radical feminists.

Implications for Pornography

Despite the lack of work to be found by republicans on free speech matters, one can find those who have directly tackled the issue of pornography. Sunstein, it has been argued by some,³⁷⁵ even sides with the radical feminist view on this matter. Indeed, he acknowledges his definition of pornography derives from these perspectives.³⁷⁶ Sunstein regards the protection of speech as key to the workings of society. However, he also regards the “prohibition of discrimination against blacks and women”³⁷⁷ as equally important. Sunstein identifies a conflict between free expression and the prohibition of discrimination, which leads him to conclude that restrictions upon pornography should be constitutionally founded.³⁷⁸ In order to facilitate restrictions, Sunstein offers a definition of pornography as material which “must (a) be sexually explicit, (b) depict women as enjoying or deserving some form of physical abuse, and (c) have the purpose and effect of producing sexual arousal”.³⁷⁹ The reasons given by Sunstein as to why pornography should be regulated focus on pornography as diminishing women’s equality, due to it defining women as subordinate to men,³⁸⁰ which, in turn, can be seen as making women un-free in accordance with republicanism’s freedom as non-domination. Being a subordinate, means

³⁷⁴ Ibid. p. 126.

³⁷⁵ Redish, M. H. & Lippman, G. Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications. *California Law Review*. Vol. 79, No 2, (Mar., 1991), p.305.

³⁷⁶ Ibid. p.306.

³⁷⁷ Sunstein, C. R Beyond the Republican Revival. *The Yale Law Journal*. Vol. 97, No. 8 Symposium: The Republican Civic Tradition, (Jul., 1998), p.1550.

³⁷⁸ Redish, M. H. & Lippman, G. Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications. *California Law Review*. Vol. 79, No 2, (Mar., 1991), p.305.

³⁷⁹ Sunstein, C. R. Pornography and the First Amendment. *Duke Law Journal*. Vol. 1986, No. 4, (Sept., 1986), p.592.

³⁸⁰ Ibid.

that someone has the capacity of arbitrary interference over you. From this perspective restricting pornography increases freedom and freedom of speech, as those oppressed by it will gain greater equality in its absence. Sunstein is concerned with three possible categories of gender related harm when regarding pornography, the harm caused to those participating in the production of pornography; the harm caused by sex-crimes that may otherwise not have been committed had it not been for the influence of pornography; and the harm caused by the social conditioning derived from the view of women promoted by pornography.³⁸¹ In addition, Sunstein turns to regulation, as opposed to the countering of pornography through more speech in the deliberative process, due to the fact that pornography's message is communicated indirectly. As such, it would be very difficult to counter it through more speech.³⁸²

The harms of pornography identified by Sunstein fall within the range of categories outlined by MacKinnon and Andrea Dworkin in their *Ordinance on Pornography*. Moreover, his definition can be paralleled with that found in MacKinnon and Andrea Dworkin's work. The radical feminist definition, though, provides further detail as to what should be legally actionable. Through a more detailed definition, any possible restrictions would be facilitated, whilst also countering liberal critiques regarding the regulation of pornography. Sunstein himself is concerned with how to counter such criticisms. To counter criticisms from the liberal rationale for liberty from a stance of neutrality, Sunstein suggests that restrictions should only be applicable to photographic and video pornography, as he does not see all the harms which he identifies pornography as causing to be applicable in the case of written pornography. Moreover, he recognises that restrictions upon written material could be labelled as opposed to the viewpoint behind pornography, rather than them being based on concerns over equality. Through limiting restrictions to video and photographs, he avoids the

³⁸¹ Ibid. p.595.

³⁸² Ibid. p.617.

criticisms of those who claim that restrictions upon pornography are not neutral towards individuals' viewpoints.³⁸³

In his arguments for the regulation of pornography Sunstein points to the fact that different categories of speech are regarded as having different value. He regards commercial speech, labour speech, and group libel as 'low-value' speech that is often restricted by the judiciary; Sunstein adds pornography to this list of 'low-value' speech.³⁸⁴ He gives four principal reasons as to why 'low-value' speech should not be protected under free speech legislation. Firstly, this speech does not aid in the control of public affairs; secondly, this speech is non-cognitive; thirdly, he takes into account the purpose of the speaker, in these instances the speaker is not attempting to convey a message; and fourthly, when regarding this speech, limitations are not made on an arbitrary basis by government.³⁸⁵

The work of Robert Post, which argues for what he refers to as 'outrageous' speech not being protected, also adds to the republican case for legitimate restrictions to be placed upon pornography.³⁸⁶ Post regards such speech as outside the acceptable norms established by the community. He develops his argument to suggest that no meaningful public discourse can take place without some shared values, thus speech that challenges these values does not warrant protection.³⁸⁷ Both pornography and racist hate speech could be seen as falling within this category. It would seem from the work of Sunstein and Post that a republican stance on freedom of speech can be seen as underpinning the radical feminist stance in the case of pornography.

³⁸³ Lederer, L. & Delgado, R. (eds.) *The Price We Pay – The Case Against Racist Hate Speech, Hate Propaganda and Pornography*. New York: Hill and Wang, (1995), pp. 268-269.

³⁸⁴ Sunstein, C. R. Pornography and the First Amendment. *Duke Law Journal*. Vol. 1986, No. 4, (Sept., 1986), p.602.

³⁸⁵ *Ibid.* pp.603-604.

³⁸⁶ Redish, M. H. & Lippman, G. Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications. *California Law Review*. Vol. 79, No 2, (Mar., 1991), p.299.

³⁸⁷ *Ibid.*

Implications for Racist Hate Speech

The case of racist hate speech proves somewhat different to that of pornography. The primacy of political speech within republican theory would seem to result in it not being possible to restrict the racist hate speech of extreme right political organisations. It has been argued that “in no other political community is the relation between speech and politics more integrated to that community’s political identity than in republics”.³⁸⁸

Similar to the case of pornography, the case of racist hate speech is tackled directly by Sunstein. He accepts that racist hate speech can be regarded as having negative consequences for the self-respect of those targeted by it, which, in turn, hinders their development.³⁸⁹ When regarding the possibility of restrictions upon racist hate speech, though, Sunstein argues that, unlike pornography, hate speech can contribute to social deliberation. As such, it must remain within the sphere of state protected speech.³⁹⁰ Sunstein concludes that restrictions upon racist hate speech could cause more harm than the speech itself. Despite the fact that Sunstein does leave some room for narrow restrictions upon hate speech in the instance of it not contributing to the exchange of ideas,³⁹¹ the racist hate speech of extreme right political organisations would fall outside of what is possible to restrict in accordance with this criterion. This conclusion is furthered by Sunstein’s argument that misleading or false political speech is crucial to a vigorous political system.³⁹²

Such a stance is in opposition to the radical feminist perspective being argued for in this thesis. The difference between Sunstein’s stance and that of the radical feminists would seem to arise due to the influence of liberal theory in the radical feminist perspective. Within the republican conception, the issue of harm does not have the primacy that it has for the radical

³⁸⁸ Matthes, M. M. *The Rape of Lucretia – and the Founding of Republics*. Pennsylvania: Pennsylvania State University Press, (2000), p. 1.

³⁸⁹ Lederer, L. & Delgado, R. (eds.) *The Price We Pay – The Case Against Racist Hate Speech, Hate Propaganda and Pornography*. New York: Hill and Wang, (1995), p. 267.

³⁹⁰ *Ibid.* p. 270.

³⁹¹ *Ibid.* p. 271.

³⁹² Sunstein, C.R. *Democracy and the Problem of Free Speech*. New York: The Free Press, (1993), p. 128.

feminist. In line with the liberal *harm principle*, the radical feminists regard harm as sufficient grounds for legitimately restricting speech. Sunstein, though, is clear when stating that he does not believe harm alone to be a suitable standard by which to regulate speech. He argues that we should also take the value of the speech into account.³⁹³ Although he considers pornography as low-value speech and thus as speech that may be restricted, he does not classify racist hate speech in the same way.

Sunstein does not believe harm alone is sufficient grounds for restricting speech, in part, due to the inclusion of political speech within what could be restricted. He believes this inclusion would threaten democratic self governance.³⁹⁴ If harm were the only standard being used to consider restrictions upon speech, he believes the burden of justification would have to be either too high or too low. In the instance of it being too low, then political speech would be at great risk. In the instance of it being too high, then private and commercial speech would become much harder to regulate. Hence, he argues that we must take the value of the speech into account. Such considerations would permit a two-tier system whereby different forms of speech had to meet different standards of harm in order to be restricted.³⁹⁵

From the perspective of the radical feminists this conclusion is problematic. There does not seem to be sufficient levels of concern over harm in order to satisfy the radical feminist stance. Irrespective, though, there is sufficient recognition by republicans of the harms through domination caused by such speech for an alignment with the radical feminist perspective. It is this republican stance on harm alone as an unsuitable standard by which to regulate speech which results in different conclusions when it comes to the racist hate speech of extreme right political organisations. The greater focus on harm found in the radical feminist literature means that they are prepared to argue in favour of a wide range of restrictions in the instance of speech leading to harm.

³⁹³ Ibid. p. 127.

³⁹⁴ Ibid.

³⁹⁵ Ibid. pp. 127-129.

3.3 Traditional Feminist Concerns with Republicanism

In order to further assess the validity of an alignment between republicanism and the radical feminists, traditional feminist criticism of republicanism must first be addressed. In particular, because feminism has traditionally been extremely critical of the republican perspective.

The distinction between the private and public domains is central to republican theory; the public realm is where citizens reside and where they become citizens. Thus, from a republican perspective, the public, when contrasted to the private arena, is granted greater importance. It is this rigid distinction between public and private that feminists have generally found problematic. Feminists argue that within this distinction there is no room for women to enter the public world; there is no room for women to become citizens and hence their value in society is lesser than that of men. According to such feminist critiques, due to the public sphere having been historically delineated and dominated by men, the attributes that are considered as necessary to participate in it are what are regarded as male attributes. Such attitudes as to what the role/attributes of men/women equate to are, in turn, promulgated by this divide. The public realm is also that of common and shared experiences. However, some have argued that women cannot share the experiences of men and that they do not have sufficient shared experiences to constitute what is necessary for entering the public realm; “the mere sharing of oppression does not constitute a common world”.³⁹⁶

According to neo-Athenian republicanism virtuous acts lead to the citizen being born. These acts need to be recognised, watched and talked about by others in order for the republic to be born. These two requirements results in a struggle between autonomy and dependence, the autonomy of the actor versus the dependency upon others to witness the acts. Through this, “the republic is deeply gendered. Split at its inception into public and private spheres that mimic the constitution of sexual difference, republics are

³⁹⁶ Rich, A. *On Lies, Secrets, and Silence – Selected Prose 1966-1978*. London: Virago, (1980), p. 203.

notoriously decried for their foundational subordination of women”.³⁹⁷ Women were banished into the private realm of motherhood,³⁹⁸ only those acts that were associated with men were considered as virtuous or worthy. In addition, the fraternal bond, necessary for the republican citizens to be able to search for the common good that is at the centre of the republic, is also based upon sexual difference, with the ideals that are imbued upon fraternity being attributes generally described by society as possessed by men.³⁹⁹

The public realm is that which has been stripped of necessity, it is a higher realm where labour is absent and thus citizens can perform their citizenship duties. Traditional divisions of labour, though, around which the public and private realms have been conceptualised in republicanism, exclude women.⁴⁰⁰ Republican theory is based on the classic republican tradition of the Greek city states where women were equated to slaves due to the labour that they carried out. It has even been argued that the polis of these states was, in fact, nothing more than “an agonistic male warriors’ club”.⁴⁰¹ Not only is the public realm idealised, though, there is also a fear that the private realm will encroach upon it, hence the rigid distinction between public and private being in place. Republicanism sees it as necessary to protect the public realm from the polluting influence of the private realm; the placing of women within the private realm puts them in the realm of the polluters, against which the virtuous man must be protected.

With regard to the case of freedom for pornography and racist hate speech, the republican public/private divide is relevant due to concerns that domination in the private sphere will be overlooked. Classic republican theory accepted that, within the private realm, there will be domination and inequality.⁴⁰² Thus, to say that something is dominated within this field is of no particular relevance. It is important to note, though, that contemporary

³⁹⁷ Matthes, M. M. *The Rape of Lucretia – and the Founding of Republics*. Pennsylvania: Pennsylvania State University Press, (2000), p. 3.

³⁹⁸ Ibid.

³⁹⁹ Ibid. p. 10.

⁴⁰⁰ Rich, A. *On Lies, Secrets, and Silence – Selected Prose 1966-1978*. London: Virago, (1980), p. 206.

⁴⁰¹ Kaplan, G.T. & Kessler, C.S. *Hannah Arendt – Thinking, Judging, Freedom*. Sydney: Allen and Unwin, (1989), p. 12.

⁴⁰² Ibid. p. 10.

republican theorists have moved away from this position. Moreover, Laborde suggests that Pettit's conception of freedom as non-domination expands "the scope of the political to spheres long considered immune from public scrutiny, notably the family, the workplace, and religious groups".⁴⁰³

3.4 Challenging Feminist Critiques

Irrespective of the numerous criticisms of republicanism to be found within feminist literature, "there have been moves in recent years to realign feminism with the republican tradition";⁴⁰⁴ with the formative influence of republicanism upon feminism being highlighted. Part of this realignment seems to be spurred by a critique of liberalism. Feminist authors such as Anne Phillips suggest that liberalism's focus on formal equality has resulted in the substantive inequality women face in society not being addressed.⁴⁰⁵ Part of the rationale behind such an argument lies in the liberal notion of equality as sameness; as a result of which some of the differences between women and men would have to be denied in order for equality to be achieved.⁴⁰⁶

Formal liberal equality in the form of equal rights does not take into consideration the historic inequalities faced by women and ethnic minorities. This social imbalance must be redressed before equal citizenship can be achieved. A way of redressing this imbalance is to focus on a republican style of participatory democracy rather than voting alone.⁴⁰⁷ Those who have considered such a redress, take into account republicanism's sharper public/private divide when compared to liberalism; they argue, though, that this divide can be overcome. Phillips, for example, argues that the issue is not with the public/private distinction itself, but with the coupling of it with male/female.⁴⁰⁸ Amongst those advocating such participatory democracy is

⁴⁰³ Laborde, C. *Critical Republicanism – The Hijab Controversy and Political Philosophy*. Oxford: Oxford University Press, (2008), p. 151.

⁴⁰⁴ Phillips, A. Feminism and Republicanism: Is This a Plausible Alliance?. *The Journal of Political Philosophy*. Vol. 8, No. 2, (2000), p. 279.

⁴⁰⁵ Phillips, A. (ed.) *Feminism and Equality*. Oxford: Basil Blackwell, (1987), p. 5.

⁴⁰⁶ Barrett, M. & Phillips, A. (eds.) *Destabilizing Theory – Contemporary Feminist Debates*. Cambridge: Polity Press, (1992), pp. 10-11.

⁴⁰⁷ Phillips, A. *Engendering Democracy*. Cambridge: Polity Press, (1991), p. 41.

⁴⁰⁸ *Ibid.* 119.

Iris Marion Young, who “combines a belief that emancipator politics requires generating a renewed sense of public life with an argument for heterogeneity and difference”.⁴⁰⁹ As a means of achieving greater democratic participation she calls for political representation for oppressed groups in policy areas that affect them; as well as veto powers in these areas.

Iris Young is not arguing against all aspects of the republican tradition, but is trying to rescue the best of the tradition from its current blindness to gender. Thus, she suggests her proposal on the representation of oppressed groups could go some way towards meeting republican concerns for, once the principle of group representation is accepted, this could prove the best antidote for self-deceiving self-interest masked as impartial or general interest.⁴¹⁰

The representation of oppressed groups through a politics of recognition, as argued for by Young, relies on a public or civic sphere, as it would be here that groups would recognise each other as worthy of equal respect.⁴¹¹

The de-gendering of the public/private divide is essential for an alignment between feminism and republicanism.⁴¹² Besides de-gendering, though, there have also been advocates of the republican tradition who argue for the possibility of de-ethnicisation of this divide. Such work is critical for the concerns relating to the oppression and domination that result from racist hate speech. Critical republicans such as Laborde, develop their interpretation of republican theory to argue for strategies of incorporation and domination avoidance for ethnic minorities.⁴¹³ Laborde argues that the historical ethnicisation of the private sphere makes it difficult for minorities to integrate into society. She believes that only through the de-ethnicisation of this sphere and the de-stigmatisation of traits associated with minority groups will such groups truly be able to incorporate and be full active citizens.⁴¹⁴

Perspectives such as those of Phillips and Young seem to aid the aligning of republicanism with the radical feminist position, not only because they challenge some of the traditional feminist concerns with republicanism, but also due to the concerns with liberal equality as sameness, a concern also found in the work of MacKinnon. In addition, a way of redressing historic

⁴⁰⁹ Ibid. p. 51.

⁴¹⁰ Ibid. p. 53.

⁴¹¹ Laborde, C. *Critical Republicanism – The Hijab Controversy and Political Philosophy*. Oxford: Oxford University Press, (2008), p. 232.

⁴¹² De-gendering of the public/private divide will be elaborated upon in the following section.

⁴¹³ Ibid. pp. 22-23.

⁴¹⁴ Ibid. p. 233.

inequalities of oppressed groups is part of the radical feminist impetus behind the call for restrictions upon pornography and racist hate speech.

Young also develops a concept of oppression alongside one of domination. Young defines oppression as:

Systematic institutional processes which prevent some people from learning and using satisfying and expansive skills in socially recognised settings, or institutionalized social processes which inhibit people's ability to play and communicate with others or to express their feelings and perspectives on social life in contexts where others can listen.⁴¹⁵

Domination, meanwhile, is defined by her as:

Institutional conditions which inhibit or prevent people from participating in determining their actions or conditions of their actions. Persons live within structures of domination if other persons or groups can determine without reciprocating the conditions of their action, either directly or by virtue of the structural consequences of their actions.⁴¹⁶

Republicans such as Richard Bellamy have taken note of Young's coupling of domination and oppression, seeing this as an addition to the interference versus domination binary; Bellamy considers oppression to involve "harming an individual's interests through such forms of direct and indirect interference as exploitation and violence or marginalisation".⁴¹⁷ Bellamy highlights the importance of a link between oppression and domination, whilst maintaining that it is important to differentiate between the two. In line with Pettit's definition of freedom as non-domination, and there not being a need for interference in order for there to be domination, Bellamy argues that although oppression and domination often go hand in hand, they need not both necessarily be present.⁴¹⁸ However, he does concede that domination can make oppression more likely, in part due to the possibility of domination resulting in oppression not being recognised as such, in the instance of the dominant party defining oppression.⁴¹⁹ The inclusion of oppression alongside domination is of particular interest from the radical feminist position, as the oppression of women through pornography is one of Dworkin and MacKinnon's main concerns.

⁴¹⁵ Young, I.M. *Justice and the Politics of Difference*. Princeton: Princeton University Press, (1990), p. 38.

⁴¹⁶ Ibid.

⁴¹⁷ Bellamy, R. *Political Constitutionalism – A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press, (2007), p. 151.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid. p. 152.

Challenging Feminist Critiques through the Work of Arendt

Although hugely important within republican fields, the work of Hannah Arendt has been heavily criticised by feminist writers. In part due to the strict public/private distinction which she adheres to, but also due to her separation of labour into the public realm. Critics argue that this separation places women solely within the private sphere. Moreover, that her praise of Rosa Luxemburg's "distaste for the women's emancipation movement"⁴²⁰ demonstrates her view that social justice and gender issues, as well as issues of race,⁴²¹ should not be politicised. The conflict between feminists and Arendt should not be undermined, the dislike of Arendt amongst feminists extends to such a degree that some have gone as far as to describing her book *The Human Condition* as: "the power of male ideology to possess such a female mind, to disconnect it as it were from the female body which encloses it and which it encloses, is nowhere more striking than in Arendt's lofty and crippled book".⁴²²

Despite these criticisms, the recent attempts to realign feminism with republicanism have included "the unexpected revival of interest in Hannah Arendt".⁴²³ Honig, for example, believes that the distinction between public and private found within Arendt's work can actually be used favourably by feminists. Honig believes that what is important in becoming and performing citizenship is who, rather than what, we are; with actors acting due to a search for self-realisation. She supports this view by highlighting that at no point did Arendt specify which class or gender is to be found within the public realm. Although Arendt is drawing a public/private distinction, there is no reason why it should also be divided along male/female lines. Dietz, like Honig, believes that Arendt may be interpreted as arguing that the

⁴²⁰ Arendt, H. *Men in Dark Time*. London: Jonathan Cape, (1970), p. 44.

⁴²¹ In her article *Reflections on Little Rock*, Arendt is critical of the use of courts and the public sphere generally for the tackling of multi-race school integration issues. See: Williams, M.S. & Macedo, S. (eds.) *Political Exclusion and Domination*. New York: New York University Press, (2005), p. 33.

⁴²² Rich, A. *On Lies, Secrets, and Silence – Selected Prose 1966-1978*. London: Virago, (1980), p. 212.

⁴²³ Phillips, A. Feminism and Republicanism: Is This a Plausible Alliance?. *The Journal of Political Philosophy*. Vol. 8, No. 2, (2000), p. 279.

public/private realms should both be genderless.⁴²⁴ Honig argues that the gendering of the realms has been imposed upon the work of Arendt by critics due to issues that are there with classic republican theory.⁴²⁵ Honig goes on to argue that as what is considered crucial for the development of citizens is the acts which they perform, matters of class and gender are not necessarily relevant.

Honig also reinterprets Arendt's work in order to counter the criticism concerning the lack of desire to politicise gender and social justice issues, something that republicans generally are unwilling to do due to a belief that "when everything is political, the sense of specificity of the political recedes".⁴²⁶ Honig argues that, for Arendt, it is not that everything is political, but, rather, that nothing is necessarily not political. In addition, Honig believes that Arendt wanted to remove shared group experiences from the public space due to these infringing upon the non-identity of individual acts which may be considered virtuous and thus political; feminists have been critical of this argument due to them believing that women's shared experiences are central to their reaching equality,. Arendt believes that basing the public space in non-identity leads to a much fairer system, as pre-constructed group identities can lead to arbitrary domination between groups.⁴²⁷ If Honig's interpretation is correct, then there is no need for women to be represented as women in the public sphere, as individual's identity would no longer be deemed relevant. The result achieved is that which feminists argue for: equality is being achieved; the difference is simply that rather than focusing on identity, identity is put aside in order for equality and freedom to be reached. This result would go some way towards tackling MacKinnon's and Andrea Dworkin's concerns over liberalism equating women to men in the name of equality; whilst also coming closer to MacKinnon's focus on equality as lack of hierarchy.

⁴²⁴ Shanley, M.L. & Pateman, C. *Feminist Interpretations and Political Theory*. Cambridge: Polity Press, (1991), p. 240.

⁴²⁵ Honig, B. Towards an Agonistic Feminism: Hannah Arendt and the Politics of Identity. in Butler, J. & Scott, J. W. (eds.) *Feminists Theorizing the Political*. London: Routledge, (1992), p. 221.

⁴²⁶ Ibid. p. 225.

⁴²⁷ Ibid. p. 227.

Another element of Arendt's work which is favourable to the radical feminist stance is her acceptance of performative acts, which goes further than that of other republicans such as Sunstein. When talking about the American Declaration of Independence, Arendt describes it as a "perfect instance of political action because it consists not so much in its being an argument in support of an action as in its being an action that appeared in word".⁴²⁸ Arendt accepts the Declaration of Independence as a speech act, the act itself is in the words, they are words which perform the act. Performative speech acts are crucial to the radical feminist conception of harm and in their theorising as to why pornography and hate speech constitute a tangible harm. The republican stance, as discussed previously, although having a conception of freedom which takes into account issues of power and domination, did not have as strong a focus on harm as the radical feminists. Thus, the primacy of political speech could not be overridden by concerns over the harm caused by extreme right political organisations' racist hate speech. Arendt's deeper acceptance of the existence and power of performative speech acts, though, means that there could be room within republican theory for these concerns surrounding the harm caused by speech to be seriously taken into account. Serious and direct harm is considered as sufficient grounds for restricting freedom from a republican as well as a liberal perspective. Sunstein's value ranking system of speech, which avoided using harm alone as a standard to judge speech restrictions, could be overridden in such a scenario.

I believe that Arendt's concern with silencing could also be used to further parallel her work with that of the radical feminists. Arendt talks of violence as a silencing act and of it therefore having to be a marginal political phenomenon, "for man, to the extent to which he is a political being, is endowed with the power of speech".⁴²⁹ In addition, she is particularly concerned with the importance of freedom itself, regarding it as the highest criterion against which political bodies are to be ruled against.⁴³⁰ Arendt believes that freedom is something which we should strive towards, whilst

⁴²⁸ Ibid. p. 216.

⁴²⁹ Arendt, H. *On Revolution*. Westport: Greenwood Press, (1963), p. 9.

⁴³⁰ Ibid. p. 22.

silencing is deemed by her to be damaging. To stretch this view to argue that her work could be aligned with that of the radical feminists with regard to legitimate restrictions being placed upon pornography does not seem unfeasible. It is difficult to see how it could be argued that Arendt would not be concerned with a performative speech act which silences a vast section of the population, in the instance of pornography being regarded as performative and silencing. Moreover, the fact that Arendt argues that “freedom in a positive sense is possible only among equals”,⁴³¹ would also seem to point towards her being concerned with such issues as the radical feminist argument that pornography and racist hate speech entrench inequalities. It must be noted, though, that as a neo-Athenian republican Arendt holds a conception of freedom as autonomy.

There is a possible issue which could develop when attempting to argue that Arendt would be in favour of legitimate restrictions being placed upon speech, as she places great importance on speech. When talking about violence, she not only refers to it as a silencing act but also as a mute act, which she believes results in it not being able to ever be a great or worthy act.⁴³² Arendt regards speech as crucial, it is central to her conception of worthy acts out of which the republic is born, it is central to the birth of the citizen, as only when the worthy acts are talked about is the citizen realised. Moreover, Arendt argues that “whenever the relevance of speech is at stake, matters become political by definition, for speech is what makes man a political being”.⁴³³ It is thus difficult to see how Arendt would be in favour of restrictions being placed upon speech. However, it is also difficult to see how Arendt would be in favour of an action which silences others, a violent action, being granted absolute freedom in society. Arendt’s recognition of performative speech acts means that pornography and hate speech could be removed from the speech category by her, that the performative utterances, in line with how the radical feminists see them, could be classified as harmful acts which wound others. Thus, perhaps it is the work of Arendt which goes the furthest towards underpinning the radical feminist stance. Although

⁴³¹ Ibid. p. 279.

⁴³² Arendt, H. *The Human Condition*. Chicago: The University of Chicago Press, (1958), p. 26.

⁴³³ Ibid. p. 3.

feminists have been so fervently opposed to Arendt's work and her desire to not politicise issues of gender. Irrespective of the fact that Arendt may not recognise issues of gender as political, her absolute denial of the relevance of gender was shown to also have as its agenda a promotion of equality. The path followed may well be vastly different from that of the radical feminists, or even any other strand of feminism. The end results, though, need not necessarily be that far apart from each other.

3.5 Conclusion

I would conclude that the concept of freedom as non-domination goes further towards conceptualising the radical feminist position than a liberal conception of freedom. The republican conception of freedom, with power and domination at its centre, means that those concerns which were not tackled by liberal theory can now be addressed. The issue of domination of women by pornography is directly addressed within republican theory. Sunstein's work on pornography and the domination over women, which he attributes to it, is very similar to that of the radical feminists. The restrictions which Sunstein argues for when regarding pornography, placate most of the radical feminist concerns.

Moreover, there is recognition within republican theory that certain speech is demeaning of certain citizens; with the republican status as a citizen being linked to the possibility of being a democratic participant. Liberal concerns with offence, meanwhile, are not necessarily connected to status in this way. Therefore, the connection between the two forms of speech being considered is not simply an issue of respect, but respect as a democratic citizen. If, in accordance with radical feminism, racist hate speech and pornography lead to domination, then republicans would consider this a breach of respect and would thus support restrictions upon such speech.

Despite the heavy criticisms within feminist theory of republicanism, it can also be concluded that the public and private distinction within republican theory need not necessarily exclude women from the political community. Moreover, Arendt's work on performative speech and its recognition could go some way towards breaching the gap that remains between the radical

feminist concerns with harm and republican theories of freedom. The recognition of performative speech means that the harm attributed to pornography and hate speech by the radical feminists could be readdressed. The radical feminists argue for restrictions over these forms of speech due to them constituting a tangible harm, due to the speech performing an act which causes harm. Arendt's theorising leaves room for this view to be recognised, the acceptance of speech as an act being a prominent aspect of the liberal critique of the radical feminist stance.

Despite this alignment when it comes to the case of pornography, though, the issue of the racist hate speech of extreme right political organisations remains. Although there is room within republican theory, as was evident in the work of Sunstein, for narrow restriction to be placed upon racist hate speech, the primacy of political speech within the republican perspective is unshakable. There is, though, an instance in which this issue could be redressed; this instance being a scenario whereby the hate speech, due to its silencing and harmful nature, could be not considered political speech irrespective of the fact that it is the speech of a political organisation. In the instance of such speech being placed in the private realm due to its nature, then it could legitimately be legislated against from a republican perspective, thus aligning the stance with that of the radical feminists.

It is important to note that Arendt is a neo-Athenian republican. Thus, the conception of freedom that she holds is not one of freedom as non-domination. Despite neo-Roman republicans not defining freedom as autonomy, though, they are concerned with political equality in the democratic process as necessary for non-domination. Freedom as self-mastery, like absence of mastery, requires civic equality. Hence I do not consider it as invalid to take Arendt's theorising into account.

An alignment with republicanism provides the radical feminist perspective with a conception of freedom which is more coherent with its calls for restrictions upon pornography and racist hate speech. Due to them not diverging from the non-interference framework, they are unable to fully articulate an account of what they find lacking in liberal theory. They use domination as an extension of the liberal account. The republican concept of

domination and freedom as non-domination provides a different account, though, one that allows the radical feminists the capacity to further articulate their stance. It adds to the validity of the perspective. Moreover, it also provides republican theory with clear definitions of both racist hate speech and pornography; definitional clarity is essential in the instance of attempting to draw out legislation or counter liberal critiques.

The following chapter will assess the radical feminist position. Through this assessment the alignment between this position and republicanism will be reaffirmed; whilst also reaffirming the conclusion of Chapter 2 that the radical feminist stance is not anti-liberal.

Chapter Four

The Anti-Pornography Radical Feminist Position

In the previous two chapters the liberal and republican positions on freedom and freedom of speech, with a focus on pornography and racist hate speech, were presented. In addition, their relation to the radical feminist perspective on these issues was examined. The principal aim of this chapter is to outline the radical feminist position. Through this outline the alignment between the radical feminist position and republicanism will be strengthened. In addition, this chapter will also tackle critiques within feminism of the radical feminist stance. The objective is to assess whether the alignment with republicanism further articulates the radical feminist position in a way that can circumvent these criticisms.

The radical feminist stance developed as a result of the so-called sex-wars within feminism during the 1970s and 1980s. Out of these debates emerged two polar opposite positions: the anti-pornography radical feminists and the pro-sex feminists.⁴³⁴ As opposed to reaching any compromise, these two positions became further entrenched in their opposition. However, the aim of both perspectives, as with the vast majority of feminist stances, was the same. Both positions wanted to ensure a better position for women in society and liberate them from oppression, with a particular focus on sexual freedom.⁴³⁵ What differed were their methods.

Despite their differences, the influence of liberal theory is apparent in the two positions. Neither side was able to move away from a liberal framework. The pro-sex feminists encouraged women to “fuck our way to freedom”,⁴³⁶ their focus being on the liberation of sex per se. The radical feminists, meanwhile, interpreted sexual freedom as freedom from oppressive sexual relations.⁴³⁷ Through their interpretations of sexual freedom, both sides became entrenched in a liberal framework. Although

⁴³⁴ Sangwand, T-K. *After the Sex Wars: Pornography and Feminism. UCLA Centre for the Study of Women Newsletter*, (2009), p. 20.

⁴³⁵ Glick, E. *Sex Positive Feminism, Queer Theory, and the Politics of Transgression. Feminist Review*. No. 64, (Spring, 2000), p. 21.

⁴³⁶ *Ibid.* p. 19.

⁴³⁷ *Ibid.* p. 21.

considerably different, both took up a liberal conception of freedom. A negative conception of freedom is implicit in both the positions; freedom is regarded by them as freedom *from* repressive sexual norms.⁴³⁸ For the radical feminists these norms are patriarchy, whilst for the pro-sex feminists they are heterosexism and sex negativity.⁴³⁹ The inability to move away from a liberal framework has resulted in the feminist critique of pornography being framed along liberal lines of freedom versus harm. As a result, radical feminists have been placed in a position whereby they must demonstrate the harms of pornography. Hence they have been eager to present pornography as violence, violence is the sort of harm that is recognised by liberalism as sufficient grounds to restrict freedom.⁴⁴⁰

To placate the liberal critique of the radical feminist position, sufficient proof of both tangible harms and a causal connection between them and pornography has to be provided. Besides the difficulties of providing this evidence, in the pornography debate, women are presented as a group. Liberal individualism may thus not be the most suitable tool for assessing this position.⁴⁴¹ This incongruence between the liberal position and radical feminism is central to this thesis. Through the alignment between republican theory and the radical feminist position, I aim to move the debate outside of the liberal framework and towards a position which I believe to be more suited to the aims of the radical feminist stance.

In order to further ascertain the validity of this alignment, as established in the previous chapter, this chapter will first explore the concerns the radical feminists have with the position of women in society, women's lack of equality. The following section will outline the radical feminist position on pornography, with the parallels to republicanism being made throughout. The third section will explore the links that have been made by radical feminists between sexism and racism. The CRT position on

⁴³⁸ Sawicki, J. *Disciplining Foucault – Feminism, Power, and the Body*. New York: Routledge, (1991), pp. 35-36.

⁴³⁹ Glick, E. Sex Positive Feminism, Queer Theory, and the Politics of Transgression. *Feminist Review*. No. 64, (Spring, 2000), p. 21.

⁴⁴⁰ Brown, B. Debating Pornography: The Symbolic Dimension. *Law and Critique*. Vol. 1, No. 2, (1990), pp. 140-142.

⁴⁴¹ *Ibid.* p. 141.

racist hate speech will then be assessed, including the possibility of extending this position to include the racist hate speech of extreme right political organisations. The final section will look at the pro-sex critique of the radical feminist position, reassessing it with republican freedom as non-domination in mind.

4.1 Equality

MacKinnon considers the impetus behind radical feminism to be a struggle against gender hierarchy.⁴⁴² Moreover, a concern with overcoming hierarchy, is central to MacKinnon's conception of equality. MacKinnon is critical of the concept of equality that is prevalent in political discourse, the concept of equality as sameness.⁴⁴³ She links this critique of equality to a critique of liberal neutrality, arguing that liberal neutrality "equates substantive powerlessness with substantive power and calls treating these the same, equality".⁴⁴⁴ The concept of equality as sameness, as identified by MacKinnon, is derived from an Aristotelian approach, whereby like is to be treated as like and unlike as unlike. From this conception of equality, a conception of inequality is developed that identifies inequality as different treatment for likes and same treatment for unlikes.⁴⁴⁵

From the radical feminist position, this conception of equality is problematic, it is viewed as having resulted in a disadvantageous position for women.⁴⁴⁶ When equality is considered as sameness, but gender is considered as difference, "women cannot be equal to men until they are no longer women".⁴⁴⁷ Moreover, neither men, nor any other socially dominant group, have, through this conception, ever had to meet any comparative test to justify the advantages they have, as they are the measure of equality. As a

⁴⁴² MacKinnon, C.A. *Feminism Unmodified – Discourses on Life and Law*. London: Harvard University Press, (1987), p. 137.

⁴⁴³ MacKinnon, C.A. *Sex Equality*. New York: Foundation Press, (2007), p. 6.

⁴⁴⁴ MacKinnon, C.A. *Feminism Unmodified – Discourses on Life and Law*. London: Harvard University Press, (1987), p. 165.

⁴⁴⁵ MacKinnon, C.A. *Women's Lives – Men's Laws*. Cambridge: The Beknap Press of Harvard University, (2005), pp. 45-46.

⁴⁴⁶ It should be noted that this is also in line with other strands of feminism. See: Benhabib, S. (ed.) *Democracy and Difference – Contesting the Boundaries of the Political*. Princeton: Princeton University Press, (1996).

⁴⁴⁷ *Ibid.* p. 50.

result, this position does not leave room for difference having been socially created, such differences being accepted as fact.⁴⁴⁸ As a consequence of equality as sameness, women have been entrenched in a position that is lower to that of men. Yet, due to the like as like and different as different distinction, this lower status is regarded as equality.⁴⁴⁹

According to MacKinnon, women's lower position is determined by their sex, with sexuality being central to maintaining women in this lower position.⁴⁵⁰ Sex in this instance, though, is likened to gender.⁴⁵¹ Unlike sex, gender is a social construct. As mentioned above, though, the equality as sameness position does not leave room for difference to be socially constructed. As a result, she regards it as feasible to describe women, despite their differences, as a group, as the abuses that women suffer are "done to women as women by men as men".⁴⁵² The lower status of women is exacerbated by their containment in the private sphere; abuses on women are considered private matters, whilst abuses on men by men are considered political.⁴⁵³ Coupled with the conception of equality as sameness, this differential treatment along the lines of sex results in a legal space that allows for the lesser treatment of women. As MacKinnon states: "men as such don't need effective laws against rape, battering, prostitution, and pornography, so not having such laws for women is not an inequality; it is just different".⁴⁵⁴ She argues that due to the Aristotelian conception of equality never having been intended to include women, it never has.⁴⁵⁵

MacKinnon suggests that a different conception of equality is necessary in order for women's lower status to be redressed, as well as the lower status of other historically subordinated groups. The conception she suggests is one of equality as lack of hierarchy. "An equality question is a question of domination and subordination. Inequality is a question of

⁴⁴⁸ MacKinnon, C.A. *Sex Equality*. New York: Foundation Press, (2007), pp. 6-7.

⁴⁴⁹ MacKinnon, C.A. *Are Women Human? And Other International Dialogues*. Cambridge: The Belknap Press of Harvard University, (2007), pp. 10-13.

⁴⁵⁰ *Ibid.* p. 13.

⁴⁵¹ MacKinnon, C.A. *Sex Equality*. New York: Foundation Press, (2007), p. 215.

⁴⁵² *Ibid.* p. 22.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.* p. 26.

⁴⁵⁵ *Ibid.* p. 122.

hierarchy”.⁴⁵⁶ For MacKinnon, subordination is the opposite of equality due to it being “an active practice of placing someone in an unequal position or in a position of loss of power”.⁴⁵⁷ Her conception of equality as lack of hierarchy begins with the assumption that no social group or its members are inferior to any other. She then questions whether entrenched historical inequalities amongst groups exist. If the members of a particular group “are systematically then found socially unequally ranked or treated or situated, social inequality has occurred”.⁴⁵⁸

Such a conception of equality can be aligned with the republican conception of freedom as non-domination. MacKinnon’s view of equality as lack of hierarchy captures a side of non-domination that is not about political interference, but, rather, about equality of status. For neo-Roman republicans political equality is an intrinsic part of the non-domination of citizens, as demonstrated by their belief in the necessity for equality when laws are drawn up.⁴⁵⁹ If women are catering to the sexual whims of men, even without any interference at all, then they are subject to a form of arbitrary rule. As such, they are dominated in a republican view. Moreover, central to the critique of equality is the question of domination; women’s domination by men. A move away from the liberal framework and towards a republican conception of freedom as non-domination would therefore seem beneficial. From this critique of equality, which will be elaborated upon in the next section, the radical feminists develop their critique of pornography.

4.2 Pornography

Mackinnon develops her conception of equality to underline the problems that she perceives with pornography. She argues that due to the gender inequalities that exist in society, which have been disregarded as different treatment for unlikes, man’s view of the world has been interpreted as truth. Man’s already more powerful speech has been further validated through this labelling as truth. Hence she sees a direct link between speech and equality,

⁴⁵⁶ Ibid. 74.

⁴⁵⁷ Ibid. p. 89.

⁴⁵⁸ Ibid. p. 125.

⁴⁵⁹ This is further discussed in Chapter 5.

“the less speech you have, the more the speech of those who have it keeps you unequal, the more the speech of the dominant is protected”.⁴⁶⁰ Pornography is part of this system of speech. Pornography “can invent women because it has the power to make its vision into reality, which then passes, objectively for truth”.⁴⁶¹ Moreover, this image of women is then presented as equality.⁴⁶² The possibility for the above happening is facilitated by Aristotelian equality not allowing room for socially constructed differences and thus inequalities. MacKinnon believes that social inequality is created and enforced through words and images.⁴⁶³ As a result, she argues that the *Pornography Ordinance*⁴⁶⁴ developed by her and Andrea Dworkin is recognition that “pornography is a practice of sex inequality”.⁴⁶⁵

The view of women that is portrayed in pornography is considered particularly problematic by MacKinnon as it sexualises violence, thereby negating the dangers of violence against women. Pornography conditions its viewers to regard violence against women as sex.⁴⁶⁶ She goes on to argue that the more violent pornography is, the more violent its viewers want it to be,⁴⁶⁷ as is the case with shock-porn. The violence that is carried out against women in pornography is further negated by the fact that women are portrayed as enjoying this violence, as consenting to it. Violence by men on men is not portrayed in this way, exacerbating the position of women as not only different from men but in a lower position when compared to men.⁴⁶⁸

⁴⁶⁰ MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993), p. 72.

⁴⁶¹ MacKinnon, C.A. *Towards a Feminist Theory of the State*. Cambridge: Harvard University Press, (1989), p. 205.

⁴⁶² MacKinnon, C.A. *Are Women Human? And Other International Dialogues*. Cambridge: The Belknap Press of Harvard University, (2007), p. 86.

⁴⁶³ MacKinnon, C.A. *Only Words*. Cambridge: Harvard University Press, (1993), p. 13.

⁴⁶⁴ Andrea Dworkin and Catharine MacKinnon wrote An Ordinance of the City of Minneapolis, Amending Title 7, Chapter 139 of the Minneapolis Code of Ordinance relating to Civil Rights: In General. Here they set out the legal accountability of pornography with regards to women. The Ordinance was written in 1983, passed into law in December 1983 but overturned by the Supreme Court. Dworkin, A. & MacKinnon, C.A. *Pornography and Civil Rights – A New Day for Women’s Equality*. Minneapolis: Organizing Against Pornography, (1989).

⁴⁶⁵ MacKinnon, C.A. *Are Women Human? And Other International Dialogues*. Cambridge: The Belknap Press of Harvard University, (2007), p. 94.

⁴⁶⁶ *Ibid.* pp. 91-93.

⁴⁶⁷ *Ibid.* p. 117.

⁴⁶⁸ *Ibid.* pp. 17-21.

This capacity to create a reality for women gives pornography the performative nature that the radical feminists claim it has.⁴⁶⁹ In order for pornography to be produced a series of acts, acts in which women are harmed, have to take place. These harms are then propagated as they result in women who are not in pornography being harmed.⁴⁷⁰ These harms subordinate women and therefore maintain them in an unequal position. Besides linking subordination with inequality, MacKinnon identifies different guises that subordination may take: objectification, hierarchy, forced submission, and at its extreme, violence. All these guises of subordination are present in pornography's representation of women.⁴⁷¹ Moreover, in a context of pornification, more and more of women's environment is created by pornography, further subordinating them.

The harms that the radical feminists refer to are clearly laid out in Dworkin and MacKinnon's *Pornography Ordinance*. In this *Ordinance*, they attempted to portray pornography as a civil rights issue due to women's *de facto* segregation. They claim that their stance, as opposed to being based on judgements about the permissibility of an idea, is based on proof of harm.⁴⁷² Although recognising that many of the harms of pornography are generally classified as illegal, they do not believe that there is effective legislation against them. Moreover, they do not consider that pornography's subordination of women, a further harm, is identified in law.⁴⁷³ There are four causes of action against pornography identified in the *Ordinance*. First, coercion into pornography, whereby it shall be regarded as discrimination to coerce, intimidate or defraud someone into performing in pornography. It is of particular interest to note here that the existence of a contract is not

⁴⁶⁹ MacKinnon's performative speech stance is developed from Austin, J.L. *How to do Things with Words*. Oxford: Clarendon Press, (1975). In accordance to which there are two types of performative utterances. 1) Illocutionary ones, whereby an act is performed in something being said. 2) Perlocutionary acts, whereby the utterance results in something happening. MacKinnon argues in *Only Words* that both these types are active in pornography.

⁴⁷⁰ MacKinnon, C.A. *Are Women Human? And Other International Dialogues*. Cambridge: The Belknap Press of Harvard University, (2007), p. 88.

⁴⁷¹ MacKinnon, C.A. *Women's Lives – Men's Laws*. Cambridge: The Beknap Press of Harvard University, (2005), p. 305.

⁴⁷² Dworkin, A. & MacKinnon, C.A. *Pornography and Civil Rights – A New Day for Women's Equality*. Minneapolis: Organizing Against Pornography, (1989), p. 30.

⁴⁷³ *Ibid.* pp. 37-8.

recognised as sufficient proof of coercion not having taken place.⁴⁷⁴ Such a stance can be paralleled to the republican perspective on the slave-contract. Second, trafficking, whereby those who distribute or display pornography, in accordance with the definition explored in Chapter 1, shall be prosecutable. Third, forcing pornography on a person, whereby it shall be considered as discrimination to force a person to watch pornography. Fourth, assault or physical attack due to pornography, whereby it shall be discrimination to attack a person directly as a result of pornography.⁴⁷⁵

The issue of proving these alleged harms, though, has been the biggest criticism of the radical feminist position. It is this point that maintains their conception within the liberal framework, as the focus is only on interference as harm. The possibility of aligning the radical feminist position with republicanism, as explored in Chapter 3, was furthered by a republican conception of freedom as non-domination considering as sufficient grounds for speech restrictions the creation of an environment whereby arbitrary interference could, as opposed to necessarily does, take place. The portrayal of women as enjoying violence, the sexualisation of violence, the objectification and subordination of women, may all be regarded as creating an environment where arbitrary interference could take place. The domination of women by men portrayed in pornography and further distributed through pornification may legitimately be regarded as creating an environment whereby women feel that men may arbitrarily interfere with them. From a neo-Roman republican perspective, irrespective of whether interference happens or not, if women regard themselves as subordinate, they will not regard themselves as civic equals. If women are portrayed as being there for the sexual gratification of men, they are likely to feel subordinate; which, in turn, will result in them behaving in subordinate ways and thus being un-free in the context of freedom as non domination.

⁴⁷⁴ Ibid. pp. 41-44.

⁴⁷⁵ Ibid. pp. 22-50.

4.3 Sex and Race

The radical feminist critique of both equality and pornography has, in part, been fuelled by concerns over racial discrimination. MacKinnon argues that sexual discrimination against women in law stemmed from the construct of legal racism. The distinctions made between different races as accepted differences allows for differential treatment, along the lines of Aristotelian equality, in turn facilitating the development of views of sexual difference.⁴⁷⁶ Sexual difference has been portrayed as a biological determinate, with a negation of social influences, just as racial difference was portrayed as genetically determined.⁴⁷⁷ Both ethnic minorities and women have been exploited on the basis of a condition of birth.⁴⁷⁸ Due to these similarities between race and sex, feminists, in a broader sense than just the radical feminists, have developed their work to argue that sexual difference should be considered alongside racial difference. They argue that “it is incoherent to promote gender parity in politics without also promoting the fairer representation of racial and ethnic minorities”.⁴⁷⁹ Moreover, the linking of sexual and racial inequality is not new, women’s movements dating as far back to the nineteenth century aligned themselves with anti-slavery movements.⁴⁸⁰

The radical feminists have taken this critique of equality, and the links they see between sex and race within it, to argue that the subordination of both women and ethnic minorities has taken a similar form. The four guises of subordination mentioned above, hierarchy, objectification, submission and violence, are identified as active against both women and ethnic minorities.⁴⁸¹ Dworkin and MacKinnon used the concept of race to inform their *Ordinance on Pornography*. They took the concept of civil rights,

⁴⁷⁶ MacKinnon, C.A. *Sex Equality*. New York: Foundation Press, (2007), p. 142.

⁴⁷⁷ Itzin, C. (ed.) *Pornography – Women, Violence and Civil Liberties*. Oxford: Oxford University Press, (1993), p. 59.

⁴⁷⁸ MacKinnon, C.A. *Feminism Unmodified – Discourses on Life and Law*. London: Harvard University Press, (1987), p. 167.

⁴⁷⁹ Phillips, A. in James, S. & Palmer, S. (eds.) *Visible Women – Essays on Feminist Legal Theory and Political Philosophy*. Oxford: Hart Publishing, (2002), p. 15.

⁴⁸⁰ *Ibid.* 16.

⁴⁸¹ Dworkin, A. *Against the Male Flood*. in Cornell, D. (ed.) *Feminism and Pornography*. Oxford: Oxford University Press, (2000), pp. 30-31.

developed from the struggle for racial equality in the United States, and applied it to women; arguing that “when the patterns of sex discrimination resemble those of race discrimination, especially as they develop under segregation, civil-rights law offers remedies”.⁴⁸²

Despite the radical feminists having been influenced by concerns with race, they do see some differences between racist hate speech and pornography. The prominent and most damaging difference they point to is that in pornography women are portrayed as enjoying the abuse they undergo.⁴⁸³ Although it should be noted that they believe pornography also uses racism, whereby “racial hatred is sexualized by making every social stereotype into a sexual fetish”,⁴⁸⁴ for example, the portrayal of Asian women as particularly submissive.

Further links between pornography and racist hate speech were explored in Chapter 1. From these links and the concerns that the radical feminists have with the issues involved, it can be argued that from this perspective pornography is to sexual discrimination what racist hate speech is to racial discrimination. As discussed in Chapter 1, the rationale behind applying the radical feminist stance to the racist hate speech of extreme right political organisations lies in the similarities between the forms of speech. As mentioned above, the radical feminists have been influenced by concerns over race. What I am doing in this thesis, though, is applying concerns with pornography to the case of race. As developed in Chapters 1 and the Introduction, the CRT definition of racist hate speech will be used due to the radical feminists not providing a full account of this form of speech. The CRT approach focuses on an individual address to another individual. In the instance of the speech being that of extreme right political organisations, though, individuals are being harmed, or dominated, as part of a group, in the same way that women are affected by pornography. From a republican non-domination perspective, in the same way that pornography could be

⁴⁸² Dworkin, A. & MacKinnon, C.A. *Pornography and Civil Rights – A New Day for Women’s Equality*. Minneapolis: Organizing Against Pornography, (1989), p. 11.

⁴⁸³ MacKinnon, C.A. *Feminism Unmodified – Discourses on Life and Law*. London: Harvard University Press, (1987), p. 167.

⁴⁸⁴ MacKinnon, C.A. *Are Women Human? And Other International Dialogues*. Cambridge: The Belknap Press of Harvard University, (2007), p. 87.

regarded as creating an environment whereby women could be, or could feel that they could be, arbitrarily interfered with, extreme right racist hate speech may be regarded as creating a similar environment for ethnic minorities. The CRT position and its application to the case of extreme right political organisations' racist hate speech will be explored in the following section.

4.4 Racist Hate Speech

Like the radical feminists, critical race theorists have linked sexism and racism, describing them as “inter-locking systems of domination that maintain each other”,⁴⁸⁵ considering them both to be hate propaganda. Like the radical feminists, they also consider both these forms of speech to support a system of inequality, keeping the target group in a subordinate position.⁴⁸⁶ Similar harms are identified as the result of hate speech and pornography; such harms include damage to an individual's psyche, diminished social prospects and inciting violence.⁴⁸⁷

The central tenets of CRT are that racism is endemic in everyday life; that legal liberal neutrality has failed to tackle issues of racism; that racism contributes to group disadvantages for ethnic minorities in Western societies; and that the broader aim should be to eliminate the social oppression of groups.⁴⁸⁸ Due to the recognition that counter-speech is not suitable for tackling racist hate speech,⁴⁸⁹ as the targets of this speech are either silenced by it or have the value of their speech diminished due to their lower social position not granting them the opportunity to access speech in the same way as the dominant majority, legal redress is sought by CRT. They see the law as a means for racist hate speech directed at historically oppressed groups, or that may incite violence against them, to be curtailed.⁴⁹⁰

⁴⁸⁵ Lederer, L. & Delgado, R. (eds.) *The Price we Pay – The Case Against Racist Speech, Hate Propaganda and Pornography*. New York: Hill and Wang, (1995), p. 94.

⁴⁸⁶ *Ibid.* p. 131.

⁴⁸⁷ Cortese, A. *Opposing Hate Speech*. London: Praeger, (2006), p. ix.

⁴⁸⁸ *Ibid.* pp. 16-17.

⁴⁸⁹ *Ibid.* p. 1.

⁴⁹⁰ Tsesis, A. *Destructive Messages – How Hate Speech Paves the Way for Harmful Social Movements*. New York: New York University Press, (2002), pp. 199-203.

A difference that is identified between pornography and racist hate speech in CRT is that the victims of hate speech tend to be in close proximity to their attackers, whereas pornography is more removed.⁴⁹¹ Hence, as mentioned above, the focus is on individual addresses to individuals. The argument in favour of this stance is that it is very difficult to identify the victim in non-targeted hate speech.⁴⁹² It is in part as a result of this stance that restrictions upon racist hate speech recommended by CRT have not been extended to include the racist hate speech of extreme right political organisations. The primacy that political speech is given in liberal theory, as discussed in Chapter 2, has also contributed to this stance not being extended to include extreme right political organisations. As with radical feminism, CRT is heavily influenced by liberal theory,⁴⁹³ it has also been unable to move away from the liberal framework. Irrespective, though, CRT considers hate speech to be an integral part of the extreme right. Identifying the use of hate speech in order to “rally support, to cement solidarity, to threaten their victims not to generate oppositional speech”.⁴⁹⁴ Moreover, the rise in racist hate speech is in part attributed to a rise in extreme right Internet activities.⁴⁹⁵ Hence I believe, in line with radical feminist theories on pornography, that the racist hate speech of extreme right political organisations may also be covered by possible restrictions applicable to individual addresses. As pornography creates a social environment for women, extreme right political organisations create a social environment for ethnic minorities. In the sense that pornography is an industry creating and distributing a form of hate propaganda, so could extreme right political organisations be viewed. Therefore the application of the theory need not be limited to individual addresses, those that are the victims of racist hate

⁴⁹¹ Lederer, L. & Delgado, R. (eds.) *The Price we Pay – The Case Against Racist Speech, Hate Propaganda and Pornography*. New York: Hill and Wang, (1995), p. 324.

⁴⁹² Delgado, R. Towards a Legal Realist View of the First Amendment. *Harvard Law Review*. Vol. 113, No. 3, (Jan, 2000), p. 784.

⁴⁹³ Matsuda, M. Lawrence, C.R. Delgado, R. Williams Crenshaw, K. *Words that Wound – Critical Race Theory, Assaultive Speech and the First Amendment*. Boulder: Westview Press, (1993), p. 35.

⁴⁹⁴ Lederer, L. & Delgado, R. (eds.) *The Price we Pay – The Case Against Racist Speech, Hate Propaganda and Pornography*. New York: Hill and Wang, (1995), p. 153.

⁴⁹⁵ Cortese, A. *Opposing Hate Speech*. London: Praeger, (2006), pp. 24-28.

speech are victims as member of a group; those who target them as a group should also be held accountable.

A move away from the liberal framework of harm and from the difficulties in proving harm, as previously mentioned, is also beneficial for this proposed extension of the theory. Like pornography, the racist hate speech of extreme right political organisations could be considered as creating an environment whereby its victims could, or could fear, being interfered with on an arbitrary basis. It is accepted by CRT that racist hate speech “harms by virtue of its incessancy – victims hear it again and again throughout their lives”.⁴⁹⁶ Over time, these messages affect the views individuals have not only of themselves but of their position in comparison with the dominant majority. Moreover, CRT argues that racist hate speech gains a large part of its power due to it being built on a history of violence, this speech can affect those it targets because they know that it has in the past often led to violence, be this historical or part of the victims personal experience.⁴⁹⁷ Such an environment, like that created by pornography, could be perceived as being in opposition to a republican conception of freedom as non-domination.

4.5 Pro-Sex Feminism

My assessment of the radical feminist position cannot ignore the pro-sex approach. Not only has this stance been the most critical of the radical feminist position on pornography, it is also necessary to assess the debate within feminism rather than purely focusing on republicanism and liberalism. Moreover, through assessing the pro-sex critique, I aim to further test the validity of the radical feminist alignment with republicanism, assessing whether this alignment placates some of the pro-sex concerns with restrictions upon pornography.

The pro-sex feminists argue that the radical feminists fail to portray women as sexual subjects in their own right,⁴⁹⁸ thus claiming it to be an anti-

⁴⁹⁶ Delgado, R. Towards a Legal Realist View of the First Amendment. *Harvard Law Review*. Vol. 113, No. 3, (Jan, 2000), p. 788.

⁴⁹⁷ Delgado, R. (ed.) *Critical Race Theory – The Cutting Edge*. Philadelphia: Temple University Press, (1995), p. 162.

⁴⁹⁸ Glick, E. Sex Positive Feminism, Queer Theory, and the Politics of Transgression. *Feminist Review*. No. 64, (Spring, 2000), p. 20.

sex stance.⁴⁹⁹ They believe that there is room for a stance that is not only against censorship but also pro-pornography, considering pornography to be a right for women as through it women may pursue their own sexuality.⁵⁰⁰ Within this position, there are arguments that the radical feminists are *othering* the women in pornography due to them simply being attractive, that there is an element of jealousy involved.⁵⁰¹ Also, that pornography is useful to women as a sex-education tool, teaching them how to have sex.⁵⁰² More importantly, though, they argue that the radical feminists are in fact promoting an image of women as victims.⁵⁰³ The pro-sex feminists fail to understand why the radical feminists have focused so heavily on pornography, when numerous other representations of women could be regarded as maintaining them in a subordinate position,⁵⁰⁴ for example television in general. As female subordination pre-dates pornography, they conclude that there are other areas that are of greater concern.⁵⁰⁵ They also argue that censorship would merely drive pornography underground and make the lives of sex-workers more dangerous.⁵⁰⁶

Some of these critiques can be regarded as merely differences of stance. The radical feminist position is not anti-sex; they are not making calls for restricting all sexually explicit material. Whereas the focus on pornography is not a negation of other forms of female oppression, it merely highlights it as an issue and a vehicle of female subordination. Similarly, the radical feminists argue that as opposed to portraying women as victims, they are emphasising women's victim status. Regarding the working conditions for women in pornography, the radical feminists believe that they are already at a level that is so poor that it is seriously concerning; they also argue that legal redress will actually allow these women to be represented. With

⁴⁹⁹ Strossen, N. *Defending Pornography – Free Speech, Sex, and the Fight for Women's Rights*. London: ABACUS, (1996), p. 20.

⁵⁰⁰ McElroy, W. *XXX: A Woman's Right to Pornography*. New York: St Martin's Press, (1995), p. ix.

⁵⁰¹ Paglia, C. *Vamps and Tramps*. New York: Vintage Books, (1998), p. 67.

⁵⁰² McElroy, W. *XXX: A Woman's Right to Pornography*. New York: St Martin's Press, (1995), p. 130.

⁵⁰³ Strossen, N. *Defending Pornography – Free Speech, Sex, and the Fight for Women's Rights*. London: ABACUS, (1996), p. 107.

⁵⁰⁴ Assire, A. & Carol, A. (eds.) *Bad Girls and Dirty Pictures*. London: Pluto Press, (1993), p. 19.

⁵⁰⁵ *Ibid.* p. 35.

⁵⁰⁶ *Ibid.* p. 33.

regards to the aspect of jealousy towards the attractive women in pornography, such an argument fails to see that what is attractive is socially constructed and changes in accordance with circumstances, and ignores the fact that what is portrayed in pornography is what is attractive to men. Similarly, pornography can be regarded not as teaching women how to have sex, but how to please men.

Other critiques, meanwhile, do seem to be placated by the alignment between radical feminism and republicanism. Pro-sex feminists argue that the radical feminists breach neutrality standards towards speech.⁵⁰⁷ This claim, though, is related to the fact that the pornography debate within feminism has failed to move away from a liberal framework. From a republican conception of freedom as non-domination, a neutrality standard is not a core concern. As republicans are aware of what Sunstein refers to as *status quo neutrality*,⁵⁰⁸ whereby neutrality is accepted as a condition which perpetuates injustice and inequality. They are also concerned with the fact that Dworkin and MacKinnon call for restrictions upon written and visual pornography that does not involve real people (animation/computer generated),⁵⁰⁹ considering such restrictions to be too broad. Again, this concern could be circumvented by the republican non-domination perspective; as such material could still contribute towards creating an environment whereby women could feel they may be arbitrarily interfered with.

The principal criticism, though, focuses on the link between pornography and sexual violence. With the pro-sex feminists claiming that there is not sufficient evidence to make such a claim⁵¹⁰ and that there is also evidence which simply counters this claim.⁵¹¹ This critique, though, is the result of the pornography debate not moving out of a liberal framework. The emphasis has remained on the burden of proof as the focus is, in line with a

⁵⁰⁷ Strossen, N. *Defending Pornography – Free Speech, Sex, and the Fight for Women’s Rights*. London: ABACUS, (1996), p. 60.

⁵⁰⁸ Sunstein, C. *The Partial Constitution*. London: Harvard University Press, (1998).

⁵⁰⁹ *Ibid.* p. 171.

⁵¹⁰ Assire, A. & Carol, A. (eds.) *Bad Girls and Dirty Pictures*. London: Pluto Press, (1993), p. 57.

⁵¹¹ McElroy, W. *XXX: A Woman’s Right to Pornography*. New York: St Martin’s Press, (1995), pp. 100-104.

liberal conception of freedom, on interference as harm. The republican concept of non-domination, though, does not require this harm to be proven. The issue at stake is whether there is the capacity for it to take place, as opposed to it necessarily taking place, or, whether those involved feel that they are in a subordinate position. As previously mentioned, those who feel subordinate will not feel that they are equals and thus will not behave as equals. From the critiques within feminism of the radical feminist position, it would therefore also seem that the theory would benefit from the alignment with republicanism proposed in this thesis.

4.6 Conclusion

From the exploration of the liberal position on pornography in Chapter 2 and the republican position in Chapter 3, it seemed that the radical feminist position and the calls for restrictions on pornography, as defined by the radical feminists, are better suited to a republican conception of freedom as non-domination as opposed to a liberal conception of freedom as non-interference. As was explored in this chapter, however, not only the radical feminists but also the pro-sex feminists who stand in opposition to them, have been unable to move away from a liberal framework. The dominance of liberal theory in Western political thought in recent times, coupled with the influence that liberalism has had upon feminist thought, has meant that, despite other feminists turning to republicanism, the radical feminists have not considered this option. I propose, though, that an alignment between the radical feminist position and a republican conception of freedom as non-domination is far more suited to their position.

Due to their remaining within the liberal framework, radical feminists have been held to fall short of the burden of proof. The focus on harm as a form of interference has resulted in many of the criticisms of the radical feminist position centring on whether it is possible to prove that pornography results in direct and tangible harm. Such proof, though, has been very difficult to obtain. By applying a republican conception of freedom as non-domination this burden is removed. The republican perspective is not concerned merely with interference, but with the capacity to arbitrarily

interfere and whether people feel that they are in a subordinate position irrespective of whether interference takes place or not. Pornography can be said to create an environment whereby women may be arbitrarily interfered with by men or are subordinate to them, a position that would be recognised as breaching freedom as non-domination. Therefore, a republican account of domination offers sufficient grounds for pornography to be restricted.

Similarly, racist hate speech could be seen as creating an environment whereby its victims may be arbitrarily interfered with or are in a subordinate position. Hence, from a republican conception of freedom as non-domination a breach of freedom can be considered as taking place, leaving legitimate grounds for restrictions upon the speech. In accordance with the radical feminist view of pornography, whereby women are harmed as part of a group, the CRT stance on racist hate speech may be extended to include the racist hate speech of extreme right political organisations, moving beyond the focus on individual addresses of hate speech.

In accordance with the definition of alignment provided in Chapter 1 it would seem that there is indeed a connection between the radical feminist and republican positions. As previously emphasised, this relationship is not causal. Rather, they offer parallel accounts in which the republican complements and deepens the radical feminist. The nature of this relationship has emerged through the assessment of the two positions as carried out in this chapter and in Chapter 3 and the various parallels that could be drawn between them. The radical feminists make suggestions but do not articulate what their conception of power and equality means for a concept of freedom. Rather, they have maintained a liberal conception of freedom despite the incongruence between this conception and their position. Republican freedom as non-domination conceptualises freedom in a way that encapsulates what the radical feminists say regarding power and equality. A republican reading of freedom gives an underpinning and conceptualisation of the radical feminist literature; strengthening the radical feminist position by circumventing some of the problems and criticisms it has faced, predominantly the burden of proof regarding the harms caused by pornography.

Chapter Five

A Liberal and a Republican Constitution

In order to further flesh out the normative work carried out in the previous chapters, I assess two case study countries in subsequent chapters. This assessment will illustrate how a liberal regime and a republican regime can differ in practice, in the ways indicated by the theory. The case study countries have been chosen predominantly due to liberalism and republicanism offering a plausible reading of their respective constitutions. One of the countries, Finland, has a constitution that offers a legal parallel to republicanism, and the other, Spain, has a constitution that parallels liberalism. In order to assess the validity of the chosen case study countries, though, I must first establish what amounts to a republican and a liberal constitution. In this chapter, the essence of a liberal and a republican constitution will be explored.

Due to the diversity that there is within both liberal and republican theory, there is no homogenous stance on what form a liberal or a republican constitution should take. Despite this lack of homogeneity, though, central tenets are present which can be categorised as either liberal or republican. By assessing these central tenets it is then possible to design a blueprint which can, in turn, be used to assess the extent to which a given constitution might be read as liberal or republican. A further problem must be acknowledged when it comes to assessing the form of a liberal and a republican constitution. Historically, both stances have been intertwined when it comes to the development of states' constitutions.⁵¹²

In endeavouring to design this blueprint, I have identified a number of categories which may be described as exemplary of the principal aims of a constitution drawn up in accordance with either republican or liberal theory. From these categories it will then be possible to equate the constitutional structure of a state's constitution and gauge to what extent the constitution being assessed can be aligned with either liberalism or republicanism.

⁵¹² Bellamy, R. & Castiglione, D. Democracy, Sovereignty and the Constitution of European Union: The Republican Alternative to Liberalism. in Bankowski, Z. & Scott, A. (eds.) *The EU and its Order*. London: Blackwell, (2000), p. 173.

The categories which will be used to draw up the constitutional blueprints are: its underlying normative rationale, the aim of the constitution, what the constitution does, the primary focus of the constitution, the constitutional formation, concept of rights held, basic rights constitutionally protected, form of government, the features of government, the legal system advocated, and other distinguishing features. These categories will now be assessed first for a republican and then for a liberal constitution.

The drawing up of these blueprints follows the methods employed by Weber in his study of social phenomena. Weber believed that social phenomena could not be understood in their totality due to the possibility of them being represented in numerous different ways. "What counts as social reality depends pretty much upon the conceptual apparatus through which we view it in the first place".⁵¹³ From this position, he concluded that what is assessed in social sciences are ideal-types that are shaped in line with our ideas regarding the problem we are trying to assess. "Weber suggests that the ideal-type is to be used as a kind of yardstick against which to compare and evaluate empirical cases".⁵¹⁴ This method has been selected as it appears suitable for the concept of alignment as defined in Chapter 1. As previously mentioned, this case study illustration is not setting out to prove a causal relationship between liberalism and republicanism and the two constitutions in question. Rather, republicanism and liberalism are said to offer a plausible reading of their central features.

5.1 A Republican Constitution

There may not be a definitive model of what form a republican constitution should take. There is, however, sufficient material by republican theorists on the ideal shape of a constitution for a working model to be developed. Despite the existence of similarities, though, it is also important to note the differences that remain within the republican camp. There are several central issues on which republican theorists have different perspectives. Richard Bellamy, for example, is opposed to a written constitution and judicial review,

⁵¹³ Parkin, F. *Max Weber*. London: Routledge, (2002), p. 28.

⁵¹⁴ *Ibid.* p. 29.

as he considers these to hinder political equality; whilst Philip Pettit accepts both of these. Despite such differences, republican theorists remain different from liberals. Even republican theorists who could be labelled as the closest to liberalism, such as Pettit, only accept certain liberal mechanisms for pragmatic reasons.

In order to arrive at the central themes of a republican constitution the central tenets of republican theory must be assessed, as constitutional theory is a method for putting theoretical ideals into practice. Therefore, it is to be expected that the concerns of a republican constitution will focus on the concept of freedom as non-domination and how it might be awarded; as well as on a politically active citizenry from which the republic can arise.

Underlying Normative Rationale

The underlying normative rationale of a republican constitution, of the neo-Roman variant identified in Chapter 3, is freedom as non-domination. This rationale will become apparent through the various sections that follow.

Aim of the Constitution

A republican constitution has two principal aims. The first is to avoid domination and prevent arbitrary rule. The second is to outline the way government should operate so as to serve this goal.

The concept of freedom as non-domination is central to the development of republican ideas on constitutions. Moreover, the belief in the need for a constitution is itself partly derived from this concept. Republicans argue that the domination of citizens by the state can be curbed through a clearly defined set of constitutional rules. These rules are set out for citizens and for the state to follow. Republicans argue that by stipulating the restrictions which face a government and the rights which citizens hold, the possibility of domination will be reduced. Through the development of a constitutional document, the arbitrary whim of those governing can be curbed; the danger of a *sleeping master*⁵¹⁵ is reduced.

⁵¹⁵ As discussed in Chapter 3.

According to Pettit, a republican constitution should include three constraints that aim to ensure the political agenda is not monopolised by the power holders. A political agenda that is monopolised by the power holders would result in domination. The first of Pettit's three constraints is the *empire of law* condition. The *empire of law* is concerned with the implementation of laws. Laws should be implemented by a public procedure that follows recognised criteria. Through such an implementation, the citizenry will be aware of what the proposed laws are before they are passed as laws. All should be treated equally in any process relating to the implementation of laws; the legislators themselves must receive equal treatment; that is to say, the same treatment as the rest of the citizenry.⁵¹⁶ Through the *empire of law*, republicans aim to avoid the possibility of laws being applied at the whim of those in power. The concerns over freedom as non-domination are clear in such a constraint. The arbitrary implementation of laws could equate the law makers with a dominant master to whom citizens must be subjects; hence the legislators must receive the same treatment as all others when it comes to the implementation of laws.

Pettit's second constraint is the *dispersion of power* condition. The *dispersion of power* is laid out to prevent anyone from being judge and jury in their own case. Through this prevention, Pettit argues, the possibility of power being employed for private as opposed to public interests is diminished. In addition, the *dispersion of power* also means that more people have a say in the enactment of the law; general rules can thus be tailored around a variety of voices.⁵¹⁷ If power is dispersed, there is a diminished chance of arbitrary decisions being made, the *dispersion of power* condition therefore also aids in the avoidance of domination.⁵¹⁸

Pettit's third constraint is the *counter majoritarian* condition. The *counter majoritarian* condition aims to protect minorities from being

⁵¹⁶ Pettit, P. in Shapiro, I. & Macedo, S. (eds.) *Designing Democratic Institutions*. New York: New York University Press, (2006), p. 129.

⁵¹⁷ Bellamy, R. & Castiglione, D. Democracy, Sovereignty and the Constitution of European Union: The Republican Alternative to Liberalism. in Bankowski, Z. & Scott, A. (eds.) *The EU and its Order*. London: Blackwell, (2000), p. 188.

⁵¹⁸ Pettit, P. *Republicanism – A Theory of Freedom and Government*. Oxford: Oxford University Press, (1999), p. 177.

dominated by the majority. In order to ensure that these constraints are met, Pettit suggests that the first constraint be present in the text of the constitution; that the second constraint be met through the separation of the judiciary and the executive; and that the third condition be satisfied through judicial review.⁵¹⁹ “The standard proposal for meeting all three conditions is to subject all legislation and administrative actions to potential review by an independent constitutional court charged with upholding the ‘higher law’ of an entrenched constitution”.⁵²⁰

It is important to note that there is strong disagreement regarding the above mentioned conditions; even amongst republican theorists who favour the concept of freedom as non-domination. Bellamy, for example, mounts a strong challenge to judicial review. He sees judicial review as constituting “blocks on democracy and, as a consequence, on political equality”.⁵²¹ In addition, he argues that judicial review may hinder ‘real change’, as he regards such change as derived from legislation.⁵²² Besides this criticism, he also finds flaws with the counter-majoritarian condition, arguing that in reality it is “usually bad for minorities and the underprivileged because it is biased towards the privileged and well organised”.⁵²³ Despite these criticisms, though, it is clear that the aim remains the avoidance of domination.

Besides reducing the possibility of domination of the citizenry, a republican constitution also outlines the way governments should operate. A republican constitution has within it detailed stipulations as to the form and features of government; these are discussed in subsequent sections.

The focus on the non-domination of citizens is also motivated by the fact that neo-Athenian republicans believe that only through non-domination can individuals develop into active republican citizens. The institutions of the state must facilitate the needs that arise for people to remain active citizens.

⁵¹⁹ Bellamy, R. *The Republic of Reason: Public Reasoning, Depoliticization, and Non-Domination*. in Besson, S. & Marti, J.L. *Legal Republicanism – National and International Perspectives*. Oxford: Oxford University Press, (2009), pp. 111-112.

⁵²⁰ *Ibid.* p. 112.

⁵²¹ Bellamy, R. *Political Constitutionalism – A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press, (2007), p. 29.

⁵²² *Ibid.* p. 44.

⁵²³ *Ibid.* p. 42.

What the Constitution Does

The two principal aims of a republican constitution mentioned above inform what a republican constitution primarily sets out to do. What a republican constitution does is also two-fold. A republican constitution first and foremost ensures that power remains in the hands of the people, republicans believe that power lies with the people. In order for this power to be exercised, a democratic government is established. The government must therefore remain accountable to the people.⁵²⁴ This accountability forms part of the rationale for democracy within republican theory. Besides ensuring that power remains in the hands of the people, a republican constitution also organises how power is to be exercised. According to republicans, the exercise of power by the state is legitimate if it is in the public interest. The best means of ensuring that this condition is met is to make power holders accountable to the people.⁵²⁵

The need for the state to rule with the ongoing assent of the people is derived from the republican concern with non-domination. Pettit, for example, emphasises how important it is that the government represent the will of the people and not its private interests. It is important for the will of the people to be represented as the people are the true power holders, and as a way of ensuring that the people are not dominated by the government. A written constitution was seen by Tom Paine as a way of ensuring that the government could not constitute itself with whatever powers it pleased; hence the non-domination of the people was protected through the constitution.⁵²⁶ As mentioned previously, though, the issue of a written constitution is one that republicans differ on. Similar to Paine, Pettit argues in favour of a written constitution,⁵²⁷ others, for example Bellamy, have been critical of this position.⁵²⁸ Part of the rationale behind the criticisms of a

⁵²⁴ Tompkin, A. *Our Republican Constitution*. Oxford: Hart Publishing, (2005), p. 64.

⁵²⁵ *Ibid.* p. 58.

⁵²⁶ Bellamy, R. *The Republic of Reason: Public Reasoning, Depoliticization, and Non-Domination*. in Besson, S. & Marti, J.L. *Legal Republicanism – National and International Perspectives*. Oxford: Oxford University Press, (2009), p. 113.

⁵²⁷ Pettit, P. *Republicanism – A Theory of Freedom and Government*. Oxford: Oxford University Press, (1999).

⁵²⁸ Bellamy, R. *Political Constitutionalism – A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press, (2007).

written constitution lie in the republican ideals of the constitution as defined through politics; which will be elaborated upon in the following sections. The argument is that a non-written constitution would facilitate and enhance the ease with which the constitution may be changed through the normal political process. In defence of Pettit, though, it is important to note that he favours a written constitution from a pragmatic stance. Therefore, his version of a written constitution would not necessarily lack the ease of change which a written liberal constitution lacks.

Part of the reason why Pettit's idea of a written constitution would still retain the political dimension promoted by republicans lies in the idea of democratic contestation. Pettit's argument in favour of electoral democracy is heavily influenced by the concept of freedom as non-domination; with electoral democracy seen as a tool to aid in the avoidance of arbitrary rule by the state. Pettit argues that a state's rule will not be arbitrary "to the extent that it is forced to track the common avowable interests of the citizens, and only the common avowable interests of the citizens".⁵²⁹ He views a form of electoral democracy, which he calls contestatory democracy, as the best way to force the state to track only these interests.

By common interests, Pettit refers to goods, with a good representing the common interest of a population:

Just so far as co-operatively admissible considerations support its collective provisions. Co-operatively admissible considerations are those that anyone in discourse with others about what they should jointly or collectively provide can adduce without embarrassment as relevant matters to take into account.⁵³⁰

These considerations are therefore not sectional or selfish; they do not represent private interests or the interests of a particular group. In order for only these interests to be tracked by government, and thus its rule not be arbitrary, Pettit suggests that democratic institutions must have a positive and a negative dimension. The positive dimension will search and identify the common interests; whilst the negative dimension will scrutinise and disallow interests which do not serve the common good. Pettit labels the first of these dimensions as authorial and the second as editorial. Electoral

⁵²⁹ Pettit, P. *A Theory of Freedom – from the Psychological to the Politics of Agency*. Cambridge: Polity, (2001), p. 154.

⁵³⁰ Ibid. p. 156.

institutions must have an authorial role in order to choose policies and policy makers from a range of alternatives. The editorial element then ensures that the policies chosen do, indeed, only track common avowable interests.⁵³¹

Pettit sees giving people the power of contestation as the most effective way of carrying out the editorial dimension. In order for this power to be realised, democratic institutions must be contestatory in character. People must be able to challenge government decisions.⁵³²

Through democratic contestation, republicans seek to minimize the amount of domination present in society...To be in a position of domination is to be subjected to interference that is arbitrary because it does account for or track an agent's interest. To have their interests accounted for and tracked removes the threat of domination and places the agent in a more secure and empowered position.⁵³³

It must be noted that there are those within the republican camp who are critical of Pettit's democratic contestation. Bellamy, for example, sees issues with the tracking of common recognisable interests. He argues that problems could arise in the identification of these interests, resulting in deference to the interests of an individual or group.⁵³⁴ In addition, he believes it will be extremely difficult to reach an agreement as to what the common identifiable interests ought to be. "The test of a political process is not so much that it generates outcomes we agree 'with' as that it produces outcomes that all can agree 'to', on the grounds they are legitimate".⁵³⁵

A system of democratic contestation is a system of accountability. Republicans argue that once the laws and the constitution are in place, there must be a system of accountability to ensure that government does not dominate the people. Systems of accountability are thus also prevalent within a republican constitution. It is through the constitution that the government can legitimately exercise the people's power. It must therefore also be through the constitution that the accountability of the government is ensured.

⁵³¹ Pettit, P. Democracy, Electoral and Contestatory. in Shapiro, I. & Macedo, (eds.) *Designing Democratic Institutions: NOMOS XLII*. New York: NYU Press, (2000), pp. 108-118.

⁵³² Pettit, P. Depoliticizing Democracy. *Ratio Juris*. Vol. 17, No. 1, (March, 2004), p. 61.

⁵³³ Maynor, J. Modern Republican Democratic Contestation: A Model of Deliberative Democracy. ECPR Joint Sessions, Workshop 24. *Republican Theory, Republican Practice*. Edinburg, (March 2003), p.20.

⁵³⁴ Bellamy, R. *Political Constitutionalism – A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press, (2007), p. 164.

⁵³⁵ Ibid.

Democracy is regarded by republicans as the most effective system of accountability.

The people's power is executed by the government in order to facilitate the organisation of society.⁵³⁶ Through these systems of accountability a republican constitution arranges how the power that the government has is to be executed; thereby fulfilling the second aim of what a republican constitution sets out to do.

Primary Focus of the Constitution

The primary focus of a republican constitution is the institutions of government. This focus is derived from the republican belief that certain conditions will allow people to develop into citizens, from which the republic will emerge. It is therefore important to foster these conditions.

Alongside the importance granted to the conditions which allow individuals to become citizens, there is also an acceptance within republican theory that these conditions are changing. As a result of the changing nature of these conditions and the idea that a republican constitution should be politically defined, a republican constitution, when compared to a liberal constitution, is easier to change. This idea will be further developed in the following sections as well as in the assessment of a liberal constitution.

The particular institutions of government that republicans focus on are the basis for a republican government. The bases for a republican government consist of political equality; the rule of law; a deliberative senate; an independent judiciary; and "a general system of checks and balances to protect public liberty against corruption and to safeguard the equal individual rights of all citizens against each other and against the state".⁵³⁷ The rationale behind these bases lies in republicans conceiving political equality and freedom as non-domination as mutually necessary, in order to achieve one the other must also be in place. Through this basis for government, these concepts are facilitated.

⁵³⁶ Tompkin, A. *Our Republican Constitution*. Oxford: Hart Publishing, (2005), p. 61.

⁵³⁷ Sellers, M.N.S. *Republican Legal Theory – The History, Constitution and Purpose of Law in a Free State*. Basingstoke: Palgrave Macmillan, (2003), p. viii.

Constitutional Formation

The constitution is regarded as key to the republic. Republicans consider that the constitution evolves over time; as opposed to it emerging from a single founding moment. The constitution was regarded by Rousseau and Kant as “the centre-piece for the difficult accommodation of liberty and authority of the government of laws and the government of men”.⁵³⁸ The constitution is regarded by such thinkers as the immediate result of the *social contract*. This view, though, is heavily disputed by republicans. There are some republican theorists who argue that this view is not far removed from the liberal position. They argue that people live in society and thus society is created, as opposed to it being created through the social contract.⁵³⁹ This stance is in line with republican freedom as created through social rules, as opposed to the liberal belief in natural liberty and hence pre-social rules. Although republicans accept that we have license outside of society, they do not always regard this license as positive. Freedom is a judicial concept created by laws that allows individuals to do things they would not otherwise be able to do.

The constitution is not regarded by republicans as a precondition of politics; rather, political debate becomes the medium through which a polity constitutes itself. This occurs not just in exceptional, founding constitutional moments, as some liberals grant, but continuously as part of an evolving process of mutual recognition.⁵⁴⁰ It is the republican conception of freedom as non-domination that leads to the “distinctive linkage of the rule of law with the distribution of power and democracy”.⁵⁴¹ As political equality is embedded within the concept of non-domination, individuals must be equal before the law and must be regarded as equals when the laws are made. Equality before the law is not considered as sufficient due to republicans

⁵³⁸ Bellamy, R. & Castiglione, D. (eds.) *Constitutionalism in Transformation – European and Theoretical Perspectives*. Cambridge: Blackwell Publishers, (1996), p. 15.

⁵³⁹ Bellamy, R. *Political Constitutionalism – A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press, (2007).

⁵⁴⁰ Bellamy, R. *Liberalism and Pluralism – Towards a Politics of Compromise*. London: Routledge, (1999), p. 120.

⁵⁴¹ Bellamy, R. & Castiglione, D. Democracy, Sovereignty and the Constitution of European Union: The Republican Alternative to Liberalism. in Bankowski, Z. & Scott, A. (eds.) *The EU and its Order*. London: Blackwell, (2000), p. 188.

observing that there is a possibility for laws to be based on whim or self interest, which would equate to domination.

The republican perception of constitutional formation as evolving, as opposed to it emerging from a single founding moment, is part of the reason why a republican constitution is easier to change than a liberal one. It is part of the reason why constitutional change is not outside of politics, as is the case for liberals, but within the normal political process.

Concept of Rights Held

According to republican theory, rights are politically defined; in contrast to the liberal conception of rights as entrenched and outside of the political game. Republican theorists believe that it is the political system that grants rights to individuals, rights are the product of the political process.⁵⁴² This idea is in contrast to the liberal conception of rights as pre-political or natural. Rights follow from the public good and what is necessary to avoid domination. Most republicans believe such matters cannot be decided *a priori*, rather, they must be decided politically, as people may reasonably disagree about rights, what people think rights require is likely to differ according to context.

Due to the republican conception of rights as politically defined the rights that emerge are institutional as opposed to human rights, which liberals tend to follow. Institutional rights are particular to the laws and accords that the citizens of a state have agreed upon.⁵⁴³ Institutional rights, unlike human rights, reflect changing circumstances and attitudes within a state. The concept of rights not being entrenched and outside of politics means that in a republican constitution there will be room for flexibility as to what the rights held are, when compared to a liberal constitution. Moreover, because rights are limited by the equal rights of others, rights can be limited if their exercise results in the capacity of another to participate in politics being diminished.⁵⁴⁴

Due to the fact that rights are not regarded as absolute, republicans leave room for rights to develop through time in accordance with political

⁵⁴² Bellamy, R. *Rethinking Liberalism*. London: Continuum, (2000), p. 177.

⁵⁴³ Ibid.

⁵⁴⁴ Honohan, I. *Civic Republicanism*. London: Routledge, (2002), p. 209.

conditions and public deliberation. “Rights get defined, refined, protected and respected through various political processes, which allow them to be tailored to particular contexts through primary and secondary legislation”.⁵⁴⁵ This concept of rights is also a reflection of the republican belief in the importance of the changing conditions affecting citizens.

It must be noted, though, that neo-Athenian republicans hold a different conception of rights. In line with their conception of freedom as autonomy and the need for a virtuous citizenry, they argue that rights should be defined “in light of a particular conception of the good society – the self-governing republic – and not according to principles that are neutral among conceptions of the good”.⁵⁴⁶ With regard to the concept of rights held, the idea of freedom as non-domination leads to significant differences from the neo-Athenian idea of a particular conception of the good. According to Pettit and Skinner - prominent neo-Roman writers - an individual must be able to pursue his own good without the arbitrary interference of others.⁵⁴⁷ Such a stance is better positioned against liberal critiques which fear oppression as a result of the concept of a pre-conceived idea of the good.

Basic Rights Constitutionally Protected

The republican concept of rights has led many liberal critics to worry about how and what rights would be protected under a republican state. Republicanism’s traditional association with a focus on duties as opposed to rights adds to such criticisms.⁵⁴⁸ Republicans believe “the moral framework of politics to be defined by a duty to participate in collective decision-making and to take the views of one’s fellow citizens seriously, rather than a right to participate that one may or may not exercise”.⁵⁴⁹ Liberals fear that a republican constitution would neglect individual rights. This concern, though, is somewhat unfounded. Although a republican constitution would, indeed,

⁵⁴⁵ Bellamy, R. *The Right to Have Rights: Citizenship Practice and the Political Constitution of the European Union*. Working Paper 25/01. ESRC. Brighton, (2001), p. 21.

⁵⁴⁶ Maynor, J.W. *Republicanism in the Modern World*. Cambridge: Polity, (2003), p. 11.

⁵⁴⁷ Larmore, C. *Liberal and Republican Conceptions of Freedom*. Chicago: University of Chicago, (2004), p. 11.

⁵⁴⁸ Farrelly, C. (ed.) *Contemporary Political Theory – A Reader*. London: Sage Publications, (2004), p. 147.

⁵⁴⁹ Bellamy, R. *Rethinking Liberalism*. London: Continuum, (2000), p. 177.

not have the same focus on rights as a liberal one, this does not mean that the rights of individuals would not be protected. Moreover, the rights that are protected under a republican constitution are, to a great extent, the same as those protected under a liberal constitution. What differs is the rationale behind these rights being secured. The differing rationales also affect the way the rights are dealt with within the constitutions.

As an intrinsic part of non-domination, the most important right for neo-Roman republicans is political equality. It is only through political equality that citizens may be treated equally before the law and when drawing up laws, a safeguard against domination. Political equality is also regarded as the most important right by republicans, due to a view that it is through equality that citizens can learn to respect the rights of others, with the validity of rights dependent upon them being respected. Life, liberty, political rights and a right to assembly and association are also politically defined by republican theorists.⁵⁵⁰

The above mentioned rights that are politically defined within the context of a republican constitution are granted such status due to the pivotal role that they play in aiding in the avoidance of domination and facilitating the development of individuals into republican citizens.⁵⁵¹ These rights are also politically defined within republican theory due to them being integral to the process of political deliberation.⁵⁵²

Form of Government

Considering that part of the primary focus of a republican constitution is the institutions of government, the form of government advocated by a republican constitution is of great importance. The form of government advocated is that of mixed government; with the focus on a balance of power. The purpose of mixed government and a balance of power is to serve the principal aim of a republican constitution. In other words, mixed

⁵⁵⁰ Honohan, I. *Civic Republicanism*. London: Routledge, (2002), pp. 209-210.

⁵⁵¹ Ibid. p. 210.

⁵⁵² Bellamy, R. & Castiglione, D. Democracy, Sovereignty and the Constitution of European Union: The Republican Alternative to Liberalism. in Bankowski, Z. & Scott, A. (eds.) *The EU and its Order*. London: Blackwell, (2000), p. 192.

government and a balance of power serve to protect people from domination; as power is distributed between people. A balance of power “offers incentives to employ political rule in non-dominating ways by being responsive to the interests of citizens”.⁵⁵³ This distribution, in turn, aids in the achievement of citizens’ common good.⁵⁵⁴

Republicans consider that a balance of power will protect the rights of citizens. The rationale behind a balance of power, as well as mixed government, was derived from a belief that a mixture of interests should be reflected in the political structure of a state; a critique that was developed from the idea of mixing different social classes.⁵⁵⁵ Mixed government is regarded as a way of mixing people and their interest, in order to aid in the achievement of non-domination by not having someone rule over another. By mixing interests and people, the possibility of domination by either the government or the interests of a particular group maybe lessened.⁵⁵⁶ Such arguments are in line with the republican ideal of individual citizens having an equal right to participation in the making of laws. Republicans have tried different methods of achieving mixing of interests and concerns. Class representation, federalism, bicameralism, proportional representation, the issue is which best promotes political equality, which republicans accept may change in accordance with different contexts.

Features of Government

In order for a mixed government to be achieved, a republican constitution stipulates numerous features of government. These features of government also achieve a balance of power. The functions used to aid in achieving the two above mentioned aims are the legislative, executive, judiciary.

The executive, legislative and the judiciary functions, it is argued by Pettit, ought to be separated. These functions should be sufficiently

⁵⁵³ Bellamy, R. *Political Constitutionalism – A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press, (2007), p. 196.

⁵⁵⁴ “In place of single sovereign there is a mixed government, in which social forces or institutions of government are balanced against one another, to prevent the domination of the state by particular interests and thus to realise the common good of citizens” Honohan, I. *Civic Republicanism*. London: Routledge, (2002), p. 5.

⁵⁵⁵ Maynor, J.W. *Republicanism in the Modern World*. Cambridge: Polity, (2003), p. 151.

⁵⁵⁶ *Ibid.* p. 152.

separated to allow for the following two things to take place, firstly, for the courts to be independent in most of their operations; secondly, for those in executive government to have to obtain legislative approval before undertaking any main initiatives.⁵⁵⁷ Pettit also argues that it is through this separation that his second constraint, the *dispersion of power* condition, is to be met.⁵⁵⁸

Pettit's view on the legislature, judiciary and executive as separate is regarded by some republicans as very close to the liberal model. They argue for a greater focus on balance as opposed to separation; moreover, this is a view later reflected in Pettit's own work. A system of institutional checks and balances allowing for contestation is regarded as facilitating balance.⁵⁵⁹ According to the neo-Roman republicans, such a system of checks and balances should include "the dispersion of democratic power across different assemblies, adherence to a more or less strict rule of law, election of public office, rotation of offices amongst the citizenry, and the like".⁵⁶⁰

There is considerable focus on the *rule of law* within a republican constitution. The ideal of following a common good is behind this focus. Republican laws should primarily revolve around the common good. With the focus on the common good meaning that republican laws should not aid in the promotion of private interests. "The chief interest of law and society should be to make the interest of each individual and the body politic as much as possible the same".⁵⁶¹ Through the promotion of common interests arbitrary rule over individuals, and hence domination, can be avoided. It is important to note that although the *rule of law* is also an idea present in liberal constitutional theory, the republican variant is much more demanding

⁵⁵⁷ Pettit, P. in Shapiro, I. & Macedo, S. (eds.) *Designing Democratic Institutions*. New York: New York University Press, (2006), p. 129.

⁵⁵⁸ Bellamy, R. *The Republic of Reason: Public Reasoning, Depoliticization, and Non-Domination*. in Besson, S. & Marti, J.L. *Legal Republicanism – National and International Perspectives*. Oxford: Oxford University Press, (2009), pp. 111-112.

⁵⁵⁹ Maynor, J.W. *Republicanism in the Modern World*. Cambridge: Polity, (2003), pp. 147-152.

⁵⁶⁰ Pettit, P. Reworking Sandel's Republicanism. *The Journal of Philosophy*. Vol. 95, No. 2, (Feb., 1998), p. 83.

⁵⁶¹ Sellers, M.N.S. *Republican Legal Theory – The History, Constitution and Purpose of Law in a Free State*. Basingstoke: Palgrave Macmillan, (2003), p. 27.

“since it goes beyond formal interpretations of equality before the law and rules out decision making on an arbitrary basis”.⁵⁶²

This common good is, in turn, to be recognised and achieved through representative democracy. Democracy is regarded by republicans as a constitutional mechanism linked to political equality. Representative democracy is thus regarded by republican theorists as a necessary condition for republicanism to be enacted.⁵⁶³ Despite contemporary liberal theorists promoting democracy, representative democracy is not a requirement for liberal ideals to be achieved. The degree to which democracy is endorsed by republicanism can be noted when one considers that there are states with constitutions that could be considered republican that implement direct democracy; Switzerland is an example. Direct democracy, though, is not generally promoted by republican theorists due to practical constraints in implementing it.⁵⁶⁴ In order to aid in the identification of the common good deliberation is also promoted; republicans argue that the decisions by those in government should be open to debate.⁵⁶⁵

Electoral democracy also plays a role in the *dispersion of power* condition. Power is dispersed amongst the electorate in equal shares. Therefore, through the democratic process, citizens “formulate collective policies on grounds that prove mutually acceptable”.⁵⁶⁶ This equal share of power, in turn, aids in the achievement of a balance of power by assuring that everyone is at the same time ruled and ruler. Through everyone being ruled and ruler accountability is also strengthened.⁵⁶⁷

The importance of the law within a republican state, in turn, places great weight on the power of the legislature. The legislature has the power to pass laws. Republicans argue that “the legislature should be bicameral, to

⁵⁶² Bohman, J. Republican Cosmopolitanism. *Journal of Political Philosophy*. Vol. 12, (2004), p. 342.

⁵⁶³ Skinner, Q. *Liberty Before Liberalism*. Cambridge: Cambridge University Press, (1998), p. 59.

⁵⁶⁴ Honohan, I. *Civic Republicanism*. London: Routledge, (2002), p. 221.

⁵⁶⁵ Pettit, P. in Shapiro, I. & Macedo, S. (eds.) *Designing Democratic Institutions*. New York: New York University Press, (2006), p. 129.

⁵⁶⁶ Bellamy, R. The Right to Have Rights: Citizenship Practice and the Political Constitution of the European Union. Working Paper 25/01. Brighton. ESRC, (2001), p. 2.

⁵⁶⁷ Bellamy, R. The Republic of Reason: Public Reasoning, Depoliticization, and Non-Domination. in Besson, S. & Marti, J.L. *Legal Republicanism – National and International Perspectives*. Oxford: Oxford University Press, (2009), p. 111.

protect and secure the common good of the people”.⁵⁶⁸ The separation of the legislature results in what is generally referred to as mixed government. In order to protect and secure the good of the people, a republican constitution also includes limited terms in office, with this forcing representatives to consider the interests of the people and decreasing the chance of despotic power. It is important to note here though, as mentioned in the previous section, that mixing and balancing is the overall aim, but the method used, be it bicameralism, proportional representation, or one of the other methods mentioned, depends on the society concerned and how well it achieves the aim of promoting non-domination.

Legal System Advocated

The importance placed upon laws in republican theory means that considerable attention should also be paid to the legal system advocated in a republican constitution. Republican theorists argue in favour of an independent judiciary. However, some republican theorists regard a supreme court as undemocratic, due to it removing decisions from the people.⁵⁶⁹ Nevertheless, judicial review is advocated by other republican theorists. Pettit, for example, argues that it is through judicial review that his third constraint, the *counter majoritarian condition*, will be met.⁵⁷⁰

To try and ensure that the common good is pursued, republicans advocate *audi alteram partem*. Through ensuring that in the legal process ‘hearing the other side’ is enacted, people are obliged to “drop purely self-referential or self-interested reasoning and to look for considerations others can find compelling, thereby ruling out arguments that fail to treat all as of equal moral worth”.⁵⁷¹ The enactment of this idea is particularly important

⁵⁶⁸ Sellers, M.N.S. *Republican Legal Theory – The History, Constitution and Purpose of Law in a Free State*. Basingstoke: Palgrave Macmillan, (2003), p. 96.

⁵⁶⁹ Bellamy, R. (ed.) *Constitutionalism and Democracy*. Aldershot: Ashgate Dartmouth, (2006), p. xv.

⁵⁷⁰ Bellamy, R. The Republic of Reason: Public Reasoning, Depoliticization, and Non-Domination. in Besson, S. & Marti, J.L. *Legal Republicanism – National and International Perspectives*. Oxford: Oxford University Press, (2009), pp. 111-112.

⁵⁷¹ Bellamy, R. & Castiglione, D. Democracy, Sovereignty and the Constitution of European Union: The Republican Alternative to Liberalism. in Bankowski, Z. & Scott, A. (eds.) *The EU and its Order*. London: Blackwell, (2000), p. 189.

due to the fact that republican laws must be made for the common good, as opposed to any private interests.⁵⁷²

The republican conception of laws is distinct from the liberal one due to the fact that laws are not considered as a breach of individual freedom; the rationale is that if the interference is not arbitrary it is not dominating, and hence not a breach of individual liberty. Democratically enacted laws will not be arbitrary as they must be passed in conditions of equality. Therefore, someone's will may not simply be imposed upon another, as they must in the enactment of laws consider the interests of others and treat them equally.⁵⁷³ This is in contrast to liberalism's requirement that individuals be equal before the law.

Other Distinguishing Features

Besides the various elements discussed above, there are other features which distinguish a republican constitution from a liberal one. Amongst these other distinguishing features are a system of ombudsmen and strengthened social movements.⁵⁷⁴ The emphasis on a system of ombudsmen and strengthened social movements is a reflection of the republican ideal of active citizens as necessary for the forming of the republic. In accordance with republican recommendations, "social and political institutions should be shaped and modified so as to encourage individuals to acquire the civic virtue which will ensure that they conscientiously fulfil their duties of political participation".⁵⁷⁵ Civic education is also advocated in order for the active citizenry to be developed.⁵⁷⁶ Republicans believe that civic virtue is not something that individuals are born with, rather, that it must be fostered; hence the need for civic education.⁵⁷⁷ It should also be noted that although republicans favour the democratisation of economic institutions and private

⁵⁷² Sellers, M.N.S. *Republican Legal Theory – The History, Constitution and Purpose of Law in a Free State*. Basingstoke: Palgrave Macmillan, (2003), p. 1.

⁵⁷³ Pettit, P. *Law and Liberty*. *Princeton Law and Public Affairs Accepted Paper Series*. Paper No. 08-019, (2009), pp. 10-12.

⁵⁷⁴ Honohan, I. *Civic Republicanism*. London: Routledge, (2002), p. 236.

⁵⁷⁵ Farrelly, C. (ed.) *Contemporary Political Theory – A Reader*. London: Sage Publications, (2004), pp. 160-161.

⁵⁷⁶ Honohan, I. *Civic Republicanism*. London: Routledge, (2002), p. 95.

⁵⁷⁷ *Ibid.*

companies, this does not equate with them being against a market economy and private property.

Implications for Free Speech Legislation

In Chapter 3, the possibilities of restrictions upon pornography and extreme right racist hate speech from a republican perspective were explored. It was concluded that from a republican stance there was a possibility for legitimate restrictions to be placed upon these forms of speech. In order for such restrictions to be implemented, though, it would have to be demonstrated that such forms of speech jeopardised the political equality of those who are victims of the speech; whilst, at the same time, placing them in a position where they are dominated as a result of the speech. The role that a republican constitution would play in the development of republicanism's theoretical stance towards freedom of speech will now be explored.

A republican constitution's focus on the importance of deliberation for the development of both the citizenry and the republic may seem to counter legitimate restrictions being placed upon speech. The importance of deliberation is further emphasised by republicans when the issue of political deliberation is considered; it is through political deliberation that, amongst other things, the common good is to be realised. The distinction between political and non-political deliberation is important here. In the instance of the forms of speech that are to be restricted being demonstrated to not be political, then there would be much greater room for legitimate restrictions from a republican perspective.⁵⁷⁸

The republican focus on freedom as non-domination, though, is present in the conception of deliberation. In order for deliberation to be valid, it must take place under conditions of non-domination; one of the roles of the constitution is to ensure that these conditions are in place. Thus, if the forms of speech at stake could be shown to present a challenge to the freedom of individuals within the citizenry, then republican theory would allow for legitimate restrictions upon such forms of speech. The concept of rights that

⁵⁷⁸ The distinctions between political and non-political speech and the role these forms of speech play in a republican stance are discussed at greater length in Chapter 3.

is found within republican constitutions also aids the possibility of implementing such restrictions. From a republican perspective rights are not natural, as is the case in liberal theory, but politically defined. As a result, rights are also regarded as limited by the equal rights of others, as opposed to being absolute. Therefore, if the free speech of an individual is curtailing the freedom of others then this speech could, in turn, be curtailed.

In addition to the role that republican conceptions of rights play in the possibility of curtailing such forms of speech, the ‘hearing the other side’ argument is also important. If the speech in question is demonstrated to silence others, then there would be grounds for the offending speech to be curtailed, as the ‘side’ of the victims of the speech would otherwise go unheard. In such instances of silencing, the silencing of a vulnerable minority would be regarded by republicans as a greater concern due to republicanism’s concern with political equality,⁵⁷⁹ something that would be of relevance when considering extreme right political organisations’ racist hate speech.

Despite the possibility of freedom of speech being curtailed in such a manner, from a republican perspective this curtailment does not mean that freedom of speech would not be constitutionally defined. The concept of freedom as non-domination means that there can be instances of interference without freedom being breached, as the interference need not be arbitrary.

5.2 A Liberal Constitution

As was the case with republican theory, there is no unified liberal constitutional model. However, there remains sufficient agreement amongst liberal theorists as to that what shape a liberal constitution should take in order to arrive at the proposed blueprint. The central tenets of liberal theory will be examined, with the specified criterion in mind. One of the principal concerns of liberal theory is individual freedom. Individual freedom is thus expected to feature heavily in a liberal constitutional model.

⁵⁷⁹ Bellamy, R. Back to the Future: Pluralism and the Republican Alternative to Liberalism. in Evans, M. (ed.) *The Edinburgh Companion to Contemporary Liberalism*, (EUP, 2001), p. 179.

Underlying Normative Rationale

The underlying normative rationale of a liberal constitution is freedom as non-interference. This rationale will become apparent in the various sections that follow.

Aim of the Constitution

Similar to a republican constitution, a liberal constitution has two principal aims. The first, and perhaps the most important, is to restrict interference and thereby maximise those exercises of freedom compatible with social life. Interference by the state is only regarded as legitimate for liberals in the instance of it resulting in greater overall liberty.⁵⁸⁰ Besides this lack of interference, liberal states must also actively promote individuals' pre-political rights.⁵⁸¹ The second principal aim of a liberal constitution is to establish the boundaries of the political sphere; to establish citizen's private sphere. Liberal democracies rest on a distinction between the state and civil society, between the public and private sphere. "Liberals see constitutionalism as a normative framework that sets limits on and goals for the exercise of state power".⁵⁸²

Liberal theorists, such as John Locke, through their conception of a constitution seek to "establish boundaries to the political sphere, designating certain values and areas of life beyond the realm of politics".⁵⁸³ Such a constitutional conception reflects core liberal views. The liberal idea of freedom as non-interference can be regarded as primary amongst these aims as it is the driving force behind the first aim and also present in the second. The liberal conception of freedom as non-interference is closely related to the delineation of areas of an individual's life in which the state may not interfere. A majority of liberal theorists accept that some level of interference will be necessary, and is therefore legitimate, in order for the

⁵⁸⁰ Ibid. p. 176.

⁵⁸¹ Bellamy, R. *Political Constitutionalism – A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press, (2007), p. 147.

⁵⁸² Bellamy, R. Back to the Future: Pluralism and the Republican Alternative to Liberalism. in Evans, M. (ed.) *The Edinburgh Companion to Contemporary Liberalism*, (EUP, 2001), p. 176.

⁵⁸³ Bellamy, R. *Political Constitutionalism – A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press, (2007), p. 147.

state to function and society to be organised. Despite this acceptance, though, liberals still argue that certain elements of an individual's life should not be interfered with.

What the Constitution Does

In accordance with its principal aims, a liberal constitution sets out to protect the rights of individuals. The protection of the rights of individuals is, again, related to the liberal conception of freedom as non-interference and to the priority that this is granted within liberal theory. Through setting out the rights of individuals, a liberal constitution is outlining the areas of a citizen's life in which the state may not interfere; hence through setting out the rights of individuals a liberal constitution also outlines the limits of government.

Primary Focus of the Constitution

The primary focus of a liberal constitution is the rights of citizens. From a liberal perspective, much of the legitimacy of the state itself is derived from the protection of individual rights. A prominent strand of liberalism derives from the *social contract* tradition. For these liberals, individuals will only agree to join the political community if it upholds principles of justice that safeguard individuals' rights. It is, therefore, only through the protection of individual rights that the political community may come into being. The liberal rationale for the constitution demarcating the limits of the state is hence tied to the issue of individual rights.

Amongst the rights that liberals regard as important, the one granted the greatest importance is liberty. Liberty is regarded as the right from which other rights are derived. The understanding of liberty that liberals adhere to is one of freedom as non-interference. The idea of freedom as non-interference will therefore be a central theme throughout a liberal constitution.⁵⁸⁴

⁵⁸⁴ Rawls, J. *A Theory of Justice*. Cambridge: The Belknap Press of Harvard University, (1971), pp. 196-197.

Constitutional Formation

Liberals consider that the formation of the constitution takes place in a single founding moment. As a response to the chaos of the *state of nature*, the constitution is an agreement that the people reach in order to ensure liberty. Locke describes the *state of nature* as “men living together according to reason, without a common Superior on Earth, with Authority to judge between them”.⁵⁸⁵ Within the *state of nature*, though, there are those who wage war; thus reasonable men enter civil society in order to overcome the three principal problems that are to be found in the *state of nature*. The first problem which leads to man being threatened in the *state of nature* is the fact that there is “no settled, known law setting a standard of ‘right and wrong’ and aiding in the settlement of disputes”.⁵⁸⁶ The second problem is that “there is no known and indifferent judge, with authority to determine all differences according to the established law”.⁵⁸⁷ The third and final problem is that in the *state of nature* there is a lack of power to back, support, or enforce a sentence when right.⁵⁸⁸

These three problems within the *state of nature* are overcome, and in turn civil society created, through the consent of every individual. This consensual agreement, or political contract, is correlated to the constitution. In a prominent and influential modern rendering of the *social contract* tradition, John Rawls argues that a constitution develops once the principles of justice of the *original position* have been decided upon; with this development setting out the powers of government and the basic rights of citizens.⁵⁸⁹ The *universal principles* are therefore reflected in the constitution.

Rawls also argues that the constitution must be entered into freely and with all those entering into the agreement considered as equals.⁵⁹⁰ Any unfair advantages, including historical advantages, are regarded by him as

⁵⁸⁵ Mace, G. *Locke, Hobbes, and the Federalist Papers – an Essay on the Genesis of the American Political Heritage*. Carbondale: Southern Illinois University Press, (1979), p. 16.

⁵⁸⁶ *Ibid.* p. 17.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.*

⁵⁸⁹ Rawls, J. *A Theory of Justice*. Cambridge: The Belknap Press of Harvard University, (1971), pp. 196-7.

⁵⁹⁰ *Ibid.* p. 221.

lessening the validity of the constitutional agreement. The constitutional agreement is regarded by Rawls as significant due to his argument that “the coercive power of the state can only be exercised on grounds that are compatible with the rational consent of its citizens”.⁵⁹¹

This view of constitutional formation leads to a significant difference in a liberal constitution when compared to a republican constitution. Whereas in a republican constitution it is possible to make changes through the normal political process, a liberal constitution is much more difficult to change. Although liberals accept that basic rights evolve and must take into consideration unanticipated circumstances, their interpretation is removed from the political sphere, and instead entrenched.

Concept of Rights Held

According to liberal theorists, individuals hold rights against which the state may not interfere. These rights which cannot be legitimately breached by the state are defined from the *state of nature* and thus it is extremely difficult to alter them; as the legitimacy of the state was derived from the agreement that people came to that recognised these rights. Within this context, rights are regarded as pre-political. This conception leads to a considerable constitutional difference when comparing liberal to republican theory. From a republican perspective the fact that rights are politically granted means that there is much greater flexibility as to what rights the citizenry holds.

According to Locke, men are, by nature, free, equal and independent. Man’s rights are directly derived from this natural condition. As a result Locke, in line with other liberal theorists, argues for natural rights,⁵⁹² “every person, in virtue of the law of nature, is entitled to life, liberty, and property in order that he may survive and thrive”.⁵⁹³ Locke describes the *state of nature*

⁵⁹¹ Bellamy, R. *Liberalism and Pluralism – Towards a Politics of Compromise*. London: Routledge, (1999), p. 43.

⁵⁹² Mace, G. *Locke, Hobbes, and the Federalist Papers – an Essay on the Genesis of the American Political Heritage*. Carbondale: Southern Illinois University Press, (1979), pp. 21-26.

⁵⁹³ Shapiro, I. *The Evolution of Liberal Rights*. Cambridge: Cambridge University Press, (1986), p. 82.

as a state of liberty.⁵⁹⁴ Although the *state of nature* leads to problems due to there being no license for enforcing laws, the aim of liberal conceptions of rights is to preserve as much of this natural liberty as possible in the social state. This view has proven compatible with both neo-liberals and social democrats. Hence, the aim of the liberal state is to minimise and equalise our mutual interference with each other's liberty. The place of liberty as a liberal right will be further discussed in the following section.

Some liberals also consider constitutionally protected liberal rights to be moral rights. For example, Joseph Raz argues that "they are valid moral rights deserving legal-institutional protection over and above normal legal protection, because they express values which should form a part of morally worthy political cultures".⁵⁹⁵ The issue of rights and morality is one on which liberal theorists have differed. Many liberal philosophers, including Mill, do not place rights in the foundations of their moral theory; others, such as Locke or Dworkin, argue that political morality is rights based.⁵⁹⁶

Basic Rights Constitutionally Protected

The principal rights protected by a liberal constitution are life, liberty and property. Liberty, though, is given primacy amongst these. Liberty is man's natural condition and thus something that must be protected. Liberal liberty is subdivided into numerous forms of liberty that are constitutionally protected. Liberal constitutions grant protection to an extensive list of freedoms. The freedoms signalled as amongst the most important are freedom of expression, freedom of political association and freedom of assembly.⁵⁹⁷ As mentioned above, though, equality is also given a place within a liberal constitution; as it would not be possible for the constitutional agreement to be reached without some form of equality, as liberals believe that these liberties

⁵⁹⁴ Bloom, A. (ed.) *Confronting the Constitution – The Challenge to Locke, Montesquieu, Jefferson and the Federalists from Utilitarianism, Historicism, Marxism, Freudanism, Pragmaticism, Existentialism*. Washington D.C.: The AEI, (1990), p. 42.

⁵⁹⁵ Raz, J. *The Morality of Freedom*. Oxford: Clarendon Press, (1986), p. 262.

⁵⁹⁶ *Ibid.* p. 193.

⁵⁹⁷ Rawls, J. *A Theory of Justice*. Cambridge: The Belknap Press of Harvard University, (1971), pp. 222-3.

must be held equally. There are, though, profound differences between liberals as to what the equal worth of liberty entails.

Form of Government

The form of government advocated by liberals is one of limited government. Liberals also argue for a separation of power; with the legislature, executive and the judiciary regarded as entities that should be separated. This separation of power is not the same as the republican balance of power. Despite the fact that historically these two concepts have been intertwined in mixed government theories, they remain distinct. The liberal division of power is not motivated by non-domination.⁵⁹⁸ For Locke, the division of power is a way of preserving man's natural liberties. Locke is concerned with government oppression. He sees the division of power as an internal system of checks and balances guarding against such oppression,⁵⁹⁹ with him regarding oppression as a breaching of man's natural rights.

The arguments in favour of the separation of power stem from the belief that only in the instance of greater overall liberty being achieved is interference by the state or laws legitimate. By separating power, the possibility of someone being judge in their own case is removed. Locke argues that as a natural right man can judge; in the *state of nature*, though, due to the lack of recognisable laws and structures, man can be judge in his own case.⁶⁰⁰ Locke considers this a dangerous situation, for if one is in a position to make and execute laws then one could, with ease, make oneself exempt from the law.⁶⁰¹ In which case there would not be equality before the law, which liberals consider as necessary in order to ensure liberty.

The removal of the possibility of man being judge in his own case also constrains "the arbitrary and partial framing and interpretation of legislation. The rule of men is replaced by the rule of universal and equally applicable

⁵⁹⁸ Bellamy, R. *Political Constitutionalism – A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press, (2007), p. 196.

⁵⁹⁹ Bloom, A. (ed.) *Confronting the Constitution – The Challenge to Locke, Montesquieu, Jefferson and the Federalists from Utilitarianism, Historicism, Marxism, Freudanism, Pragmaticism, Existentialism*. Washington D.C.: The AEI, (1990), p. 35.

⁶⁰⁰ *Ibid.* p. 42.

⁶⁰¹ *Ibid.* p. 107.

general laws".⁶⁰² The *rule of law* is a central tenet of liberal constitutionalism; its principle purpose is conceived as preventing government from abusing its power.⁶⁰³ Abuse of power is avoided as the *rule of law* provides a framework that enables social and economic activities to be pursued freely without collapsing into political conflict.⁶⁰⁴

The liberal promotion of limited government is spawned from an intrinsic mistrust of government within liberal theory. Liberals believe that through limitations, government's capacity to interfere upon the lives of individuals will be diminished. Through limiting government, the possibility of man's natural rights being breached lessens. Despite liberals accepting the need for a sovereign in order to facilitate the administration of the state, they also accept that the power granted to the sovereign can result in the rights of individuals being breached.

Liberals such as Nozick also argue that a limited state is the only possible means of ensuring that the initial agreement that spawns government from the *state of nature* can be reached. Only through the proposal of limited government can a consensus be reached between the members of the community in question.⁶⁰⁵ It must be noted, though, that liberals are divided on this issue. Social liberals see a greater need for state regulation; the aim, though, remains the preservation of freedom.

In order for this limited state to be successful, it must be accountable to the people. "The standard devices for this purpose have been the constitutions of representative government and the separation of the legislative, executive and judicial powers".⁶⁰⁶ Central to this division of powers, is the fundamental role which the *rule of law* plays in liberal theory's conception of the state. It is only through the prior announcement of laws that the state can hold citizens accountable, thus avoiding the abuse of power by

⁶⁰² Bellamy, R. Back to the Future: Pluralism and the Republican Alternative to Liberalism. in Evans, M. (ed.) *The Edinburgh Companion to Contemporary Liberalism*, (EUP, 2001), p. 176.

⁶⁰³ O'Neill, T.J. Liberal Constitutionalism & Bureaucratic Discretion. *Polity*. Vol. 20, No. 3, (Spring, 1988).

⁶⁰⁴ Bellamy, R. *Rethinking Liberalism*. London: Continuum, (2000), p. 79.

⁶⁰⁵ Shapiro, I. *The Evolution of Liberal Rights*. Cambridge: Cambridge University Press, (1986), p. 156.

⁶⁰⁶ Charvet, J. & Kaczynska-Nay, E. *The Liberal Project and Human Rights – The Theory and Practice of a New World Order*. Cambridge: Cambridge University Press, (2008).

government and the curtailing of individuals' rights.⁶⁰⁷ The *rule of law* will be discussed further in the following section.

Features of Government

The features of government that are proposed by liberals in order for the form of government that they advocate to be achieved are popular sovereignty, the *rule of law*, a deliberative senate, an independent judiciary and numerous systems of checks and balances. Rawls believes that governments should be built around what he calls the *basic structures*. Rawls' *basic structures* are the political, social and economic institutions which he believes a liberal state should feature. The *basic structure* consists of a political constitution with an independent judiciary, the legally recognised forms of property, and the structure of the economy as well as the family in some form.⁶⁰⁸

Despite democracy not being strictly necessary for a liberal state, democracy has now become an integral part of modern liberal theory and states. Democracy is regarded by contemporary liberals as necessary for equality to be fulfilled. Democracy, though, is also considered as important due to a belief in pluralism. Liberals uphold a belief in societal pluralism, moral pluralism and political pluralism.⁶⁰⁹ Liberals argue that only through the promotion of these forms of pluralism will varying conceptions of the good be sustained. Liberals believe that individuals should be able to pursue their own chosen life paths in order to be able to flourish, within the confines of the laws agreed upon in the founding constitutional moment. Only through the flourishing of individuals will society as a whole be able to flourish and further itself. From a liberal perspective, political pluralism is generally represented by a multi-party system.⁶¹⁰ The argument in favour of democracy from the perspective of pluralism results in liberals considering democracy "in

⁶⁰⁷ O'Neill, T.J. Liberal Constitutionalism & Bureaucratic Discretion. *Polity*. Vol. 20, No. 3, (Spring, 1988), pp. 371-393.

⁶⁰⁸ Rawls, J. in Farrelly, C. (ed.) *Contemporary Political Theory – A Reader*. London: SAGE Publications, (2004), p. 3.

⁶⁰⁹ Zafirovski, M. *Liberal Modernity and its Adversaries – Freedom, Liberalism and Anti-Liberalism in the 21st Century*. Leiden: Brill, (2007), pp. 81-111.

⁶¹⁰ Ibid. p. 371.

instrumental terms as a means for individuals to pursue their private interests".⁶¹¹ On the whole, liberals have favoured what Held calls a protective,⁶¹² rather than a participatory, view of democracy; with it being regarded as instrumental rather than intrinsic. For liberals, democracy has a protective function, as they are concerned with the possibility of the tyranny of the majority; hence there are constitutional constraints in place. This is in contrast to the republican idea of democracy as a constitutional mechanism linked to political equality discussed previously.

Legal System Advocated

An independent judiciary is regarded by liberals as guarding the constitution and the rights of individuals. Liberals believe in a supreme court; with courts - particularly a supreme court - regarded as necessary for the protection of the content of the constitution.⁶¹³ The supreme court interprets the constitution in order to determine the fundamental rights of individuals, it also protects these rights.⁶¹⁴ In the role of protecting rights, the supreme court also acts as a monitor on the legitimacy of government, as it assesses the extent to which government interference is legitimate.⁶¹⁵

Alongside the belief in a supreme court, liberals consider the constitution to be a 'higher' law. Judicial review supported by a bill of rights is regarded by liberals as the best way of ensuring that this 'higher' constitutional law does not fall victim to the whim of the majority in democratic elections.⁶¹⁶ This belief in the constitution as a higher law again adds to the difficulties in changing a liberal constitution when compared to a republican one.

⁶¹¹ Bellamy, R. Back to the Future: Pluralism and the Republican Alternative to Liberalism. in Evans, M. (ed.) *The Edinburgh Companion to Contemporary Liberalism*, (EUP, 2001), p. 197.

⁶¹² Held, D. *Models of Democracy*. Cambridge: Polity, (2006).

⁶¹³ Schweber, H. *The Language of Liberal Constitutionalism*. Cambridge: Cambridge University Press, (2007), p. 194.

⁶¹⁴ Reiman, J. *Critical Moral Liberalism – Theory and Practice*. London: Rowman & Littlefield Publishers Inc., (1997), p. 123.

⁶¹⁵ Ibid. p. 135.

⁶¹⁶ See: Macedo, S. *Liberal Virtues – Citizenship, Virtue, and Community in Liberal Constitutionalism*. Oxford: Clarendon Press, (1990); Stoner, J.R *Common Law & Liberal Theory – Coke, Hobbes, & the Origins of the American Constitution*. Kansas: University Press of Kansas, (1992).

Other Distinguishing Features

Besides what has been discussed above, there are other distinguishing features that help identify a liberal constitution. Amongst these distinguishing features is a belief in a secular state. Liberals argue in favour of a secular state due to their belief in numerous conceptions of the good. Only through establishing a secular state will prejudice against the individual beliefs of citizens be prevented.⁶¹⁷ Although it must be noted that there are some liberal states, such as the United Kingdom and Norway, that have maintained a link to the church.

Welfare policies are advocated by contemporary liberal theorists such as Ronald Dworkin. Dworkin's rationale is based on two main principles which he regards as making demands on government. The first principle is the principle of equal importance; according to which it is important, from an objective point of view, that human lives be successful as opposed to wasted. This aim for success is regarded as equally important for all human lives. The second principle is the principle of special responsibility; according to which the responsibility for the success of any given human life rests with the person whose life it is; although we must still recognise the equal objective importance of the success of a human life.

These two principles make different demands on government. The principle of equal importance requires government to adopt laws and policies that insure that its citizens' fates are, so far as government can achieve this, insensitive to who they otherwise are – their ethnic background, race or particular set of skills and handicaps. The principle of special responsibility demands that the government work, again as far as it can achieve this, to make their fates sensitive to the choices they have made.⁶¹⁸

According to Dworkin, welfare states are not only compatible with these principles, but they should in fact be actively encouraged. Dworkin regards welfare states as a means of ensuring that the acceptable minimum standards of living, below which people should not be allowed to fall, are met.⁶¹⁹ The inequalities which these welfare states should redress are

⁶¹⁷ Dworkin, R. *Is Democracy Possible Here – Principles for a New Political Debate*. Princeton: Princeton University Press, (2006), p. 60.

⁶¹⁸ *Ibid.* pp. 7-8.

⁶¹⁹ *Ibid.* p. 3.

identified by Rawls as primary goods, including health, an adequate income, education, physical security and housing.⁶²⁰

Implications for Free Speech Legislation

In Chapter 2, the possibility of restricting speech from a liberal perspective was explored. The conclusion reached was that there were very narrow possibilities for restricting speech from a liberal perspective. The racist hate speech of extreme right political organisations could not be restricted; in part due to the primacy granted to political speech, but also due to a belief that this type of speech does little more than cause offence, leaving no legitimate grounds for restrictions. There were also extremely limited possibilities for restricting pornography, the offense argument again applying in this instance.

From the perspective of a liberal constitution, it would seem that the possibilities for restricting speech are further contracted. The normative rationale of a liberal constitution is freedom as non-interference. A liberal constitution sets out to draw the lines that cannot be crossed by government in order for it to remain legitimate. One of these lines that cannot be crossed by a legitimate government is the breaching of individuals' freedom of speech, except to promote speech overall, for example, rules of order for debate.

In addition to the fact that a liberal constitution is clear in setting out freedom of speech as one of the fundamental rights of individuals, the liberal conception of rights as pre-political means that the possibility of this right being changed is extremely unlikely. Liberals must always seek to maximise overall non-interference. That creates a presumption against interfering, especially in areas that do not involve a physical coercion – such as speech. Promoting non-domination, meanwhile, can allow interference that is non-arbitrary. Republicanism accepts there can be domination without interference, and allows for interferences that are non-arbitrary and non-dominating that can promote public goods. It thus seems clear that from the

⁶²⁰ Ibid. p. 18.

perspective of a liberal constitution, in contrast to a republican one, the possibility of restricting speech would be virtually non-existent.

5.3 Conclusion

The above mentioned blueprint as to what form a liberal and a republican constitution would take can now be developed. From the comparative table illustrated below the extent to which the case study countries' constitutions can be aligned with these ideal-types will be explored in Chapter 6.

**Table 5.1:
Blueprint – Liberal and Republican Constitutions**

	Liberal	Republican
Underlying normative rationale	Freedom as non-interference.	Freedom as non-domination.
Aim of the constitution	To restrict interference – to maximise non-interference elements of freedom compatible with social life. All whilst promoting pre-political rights. To establish the boundaries of the political sphere – establish citizen's private sphere.	To avoid domination and prevent arbitrary rule. To outline the way government should operate. Facilitate an active citizenry.
What the constitution does	Protects the rights of individuals.	Ensure power remains in the hands of the people – the state must therefore remain accountable, hence democracy is necessary. It organises how power is executed.
Primary focus of the constitution	The rights of citizens.	The institutions of government.
Constitutional formation	Takes place in a single founding moment – as a response to the chaos of the <i>state of nature</i> this is an agreement that the people reach in order to ensure liberty. This results in a more rigid constitution that the republican variant.	The constitution is key to the republic – it evolves over time and does not take place in a single founding moment. Constitutional flexibility partly derived from this.
Concept of rights held	Individuals hold rights against which the state may not interfere – these are defined from the state of nature and cannot be shifted. Right's as pre-political.	Rights are not absolute – they are limited by the equal rights of others. This means there is flexibility as to what the rights held are. The political system grants rights to individuals.

Basic rights constitutionally protected	Life and liberty. Extensive list of other freedoms including freedom of expression, association, assembly, etc.	The most important right is political equality – life, liberty, political rights and a right to assembly and association also politically defined.
Form of government	Limited government. Separation of power (legislature/judiciary/executive). System of institutional accountability.	Mixed government – balance of power. This serves to protect people from domination as it distributes power between people.
Features of government	Popular sovereignty – rule of law – deliberative senate – independent judiciary – system of checks and balances. Belief in plurality and multiple conceptions of the good. Democracy now accepted as necessary although not implicit in the theory.	Balance of power: partly through separation of the legislative, executive, and judiciary. System of checks and balances for contestation, including dispersion of democratic power, rule of law, elections for public office.
Legal system advocated	Liberals believe in a supreme court.	Independent judiciary – republicans do not necessarily believe in a supreme court. 'Hearing the other side' approach.
Other distinguishing features	Welfare policies advocated by contemporary liberals. Secular state.	System of ombudsmen, strengthened social movements. Not against market economy and private property but favour democratisation of economic institutions and private companies.
Implications for free speech legislation	Extremely limited possibility of any restrictions.	Restrictions advocated upholding political equality in the instance of the speech in question not treating another with equal concern and respect.

Chapter Six

The Finnish and Spanish Constitutions

In this chapter I look at the Constitutions of Spain and Finland, assessing to what extent it is possible to align the Spanish Constitution with liberalism and the Finnish Constitution with republicanism. Many elements of both Constitutions will be superficially similar, in part, due to the historical intertwining of liberalism and republicanism. The two models will also vary from the blueprints drawn up in Chapter 5, as these are ideal-types. Irrespective, there are elements in the Spanish Constitution that align it to liberalism and elements in the Finnish Constitution that align it to republicanism. Particularly, these elements are derived from the concept of rights held in each case. In Finland, there is a notion of political equality that could be aligned to non-domination and greater ease for changing the Constitution, along the lines of the normal political process. In Spain, rights are outside of politics, they are politically entrenched and the judiciary are the guardians of the Constitution, it is therefore more difficult to change it.

In order to ascertain whether these Constitutions can be aligned to liberalism or republicanism, I fit them into the blueprint drawn up in Chapter 5. These categories will now be assessed in order, first for Finland and then for Spain.

6.1 Finland's Constitution

The general conception of Finland, similar to its Scandinavian neighbours, is of a liberal state where equality prevails; where there are high standards of social welfare and people are politically active. Finland is regarded as a country where there is considerable equality between men and women, where many of the social and economic problems faced by other Western European countries are not to be found. It has even been argued that "Finland has perhaps the most equal income distribution in the world";⁶²¹ that "Finland has perhaps the least corrupt system of public administration in the

⁶²¹ Pesonen, P. & Ruhinen, O. *Dynamic Finland – The Political System of the Welfare State*. Helsinki: Finnish Literary Society, (2002), p. 9.

world”;⁶²² and that Finland “is one of thirteen countries that have been democratic continuously since World War I”.⁶²³ I argue, though, for an alignment between the Finnish Constitution and republicanism.

When considering whether the Finnish Constitution can be aligned to republicanism it is important to highlight the fact that within Finnish political thought the Constitution is, in fact, regarded as a republican constitution. It has been argued that when Finland gained independence in 1917, it was actively decided that the new state should be given a republican constitution.⁶²⁴ Moreover, “the first three sections of the Constitution define the political system of Finland as a republican parliamentary democracy”.⁶²⁵ It merely being claimed as a republican constitution, though, clearly does not provide sufficient rationale for the Finnish Constitution to be aligned with republicanism. Thus, I will now assess the Finnish Constitution in the order of the categories in Table 5.1.

Aim of the Constitution

The aim of the Finnish Constitution is to set up the rules of government in order for citizens to flourish. Political equality within a democratic system is prioritised as a means of securing the rights of individuals; parallel to republicanism, which claims rights are ensured through political equality.

What the Constitution Does

Ensuring that power remains in the hands of the people can be regarded as the principal action of the Finnish Constitution. Section 2 of Chapter 1 of the 1999 Finnish Constitution states that “the powers of the State in Finland are

⁶²² Ibid.

⁶²³ Ibid. p. 34.

⁶²⁴ Finnish Political Science Association, *Democracy in Finland*. Helsinki: The Government Printing Office, (1960), p. 44.

⁶²⁵ Nousiainen, J. *The Finnish System of Government: From a Mixed Constitution to Parliamentarism*.

http://www.om.fi/Satellite?blobtable=MungoBlobs&blobcol=urldata&SSURIdapptype=BlobServer&SSURIdcontainer=Default&SSURIsession=false&blobkey=id&blobheadervalue1=inline;%20filename=Nousiainen_en.pdf&SSURIsscontext=Satellite%20Server&blobwhere=1243790092781&blobheadervalue1=Content-Disposition&ssbinary=true&blobheader=application/pdf. (Accessed 27/09/09).

vested in the people”.⁶²⁶ This power, in line with republican conceptions, is organised through the government via the Constitution. Besides power being in the hands of the people, though, from a republican conception, democracy is also necessary to ensure that the government remains accountable. In the Finnish Constitution, democracy is highlighted as extremely important for the functioning of society. The Finnish Constitution states that “democracy entails the right of the individual to participate in and influence the development of society and his or her living conditions”.⁶²⁷

Section 2 of Chapter 1 of the Constitution has a provision to make Finland a representative democracy. The people of Finland also hold power through municipal self-government. Municipal self-government is recognised under Section 121 of the Constitution.⁶²⁸ Alongside this self governance, the Constitution provides for the autonomy of the Aland Islands, the cultural self-government of the Sami and the self-governance of universities. Section 2 of Chapter 2 allows for direct democracy in the instance of there being a referendum.⁶²⁹ Such roles and variants of democracy shows a clear concern for the power remaining in the hands of the people and ensuring the accountability of the government into whose hands this power is entrusted.

Primary Focus of the Constitution

The principal focus of the Finnish Constitution can be regarded as the institutions of government and how they are to work. The Constitution’s stipulations on the institutions of government and how they are to work can be found in Chapters 3 - *The Parliament and the Representatives*, 4 - *Parliamentary Activity* and 5 - *The President of the Republic and the Government*.⁶³⁰ These Chapters provide details of how a balance of power ought to be achieved and outline how representatives are to be elected and what their roles shall be. Further details are given surrounding the

⁶²⁶ The text of the Finnish constitution can be found in the Finnish Ministry of Justice’s website: <http://www.om.fi/21910.htm> (Accessed: 18/10/09).

⁶²⁷ Ibid.

⁶²⁸ Ibid.

⁶²⁹ <http://www.kansanvalta.fi/en/Etusivu/Ajankohtaista/Puheenvuoroja/1157538738440> (Accessed: 21/10/09).

⁶³⁰ <http://www.om.fi/21910.htm> (Accessed: 18/10/09).

democratic elections of representatives; separate parliamentary and presidential elections; limited terms in office for presidents and parliamentary representatives; and how the parliament and the presidency ought to cooperate in order to best represent the interests of citizens.

These concerns with the institutions of government and their members, as well as the focus on democracy noted above, are alienable with republican constitutional ideas. Although the institutions of government comprise the bulk of constitutions in general, there is a particular focus on process and structures along republican lines.

Constitutional Formation

Until the year 2000 Finland did not have a single Constitution. In 1999 a Constitution for Finland was drawn up, it coming into force on 1 March 2000. Before then, Finland had a number of Parliamentary Acts with constitutional status.⁶³¹ The 1999 Constitution amalgamated a number of these Acts. Despite this amalgamation, though, some of these Acts remain in place. Thus, it is important to take these other documents into account and not merely the document produced in 1999. Such a constitutional formation demonstrates room for constitutional development in Finland. Rather than taking place in a single founding moment, the Finnish Constitution has grown and changed according to circumstances. According to republican theory a constitution should evolve over time due to the critical role that it plays in the development of the republic. Liberal constitutions also change and develop; however, along a liberal framework such changes are subject to legislative processes. Along a republican framework, they are political; as is the case in Finland.

Concept of Rights Held

The Finnish Constitution can be altered as circumstances change by following the procedure prescribed for the altering or enactment of

⁶³¹ These acts were: the 1919 Constitution Act, the 1922 Parliament Act, the 1922 Ministerial Liability Act, the 1922 Chancellor of Justice and the High Court of Impeachment Act and the 1951 Autonomy Act of Aland. Sundberg, J. & Berglund, S. (eds.) *Finnish Democracy*. Jyvaskyla: Gummerus Printing, (1990), p. 27.

fundamental laws. This possibility for alteration is important when it comes to the formation of the Finnish Constitution as well as when regarding its concept of rights. The Finnish Constitution allows for exemptions to be made to even the most basic rights. Finland has been regarded as a state with a constitution which has a different concern for rights than that found in liberal states.⁶³² In Finland there is a political rather than a legal conception of rights.

According to the Finnish Constitution, there is a:

Specific constitutional rule which states that exceptions can be made from the constitution on conditions that the exceptions are decided in a manner that honours the qualified procedure prescribed for the altering or enactment of fundamental laws. Such exceptions from the prescriptions of the constitution can be made without altering the letter of the constitution, and are valid for some specific or non-specific time, during which they, in fact, circumvent the fundamental law.⁶³³

In accordance with this rule, any element of the Constitution, even the most fundamental rights, may be altered. No part of the Finnish Constitution is beyond amendment. Although all constitutions can change, the point of interest is that in Finland there is sufficient ease for such change to take place for it to be considered plausible. The possibility to make amendments to any part of the Constitution further demonstrates a concern for changing circumstances and the importance of these being reflected in the Constitution.

From a liberal perspective, the rights that are constitutionally defined are beyond the reach of government. Due to the liberal conception of rights as pre-political and natural the state cannot breach them. Republican theory, though, does not regard rights as pre-political or natural. Rather, rights are considered by republicans as politically granted. Republicans also do not consider rights to be absolute, as they must be limited by the equal rights of others. A constitution that does not hold rights as absolute and which allows for exemptions to be made to the holding of rights cannot be regarded as having a liberal conception of rights. Within republican theory, whereby rights are not absolute, there would be theoretical room for a constitutional rule

⁶³² Finnish Political Science Association. *Democracy in Finland*. Helsinki: The Government Printing Office, (1960), p. 68.

⁶³³ Sundberg, J. & Berglund, S. (eds.) *Finnish Democracy*. Jyväskylä: Gummerus Printing, (1990), p. 40.

such as the one mentioned above. With regard to a concept of rights, therefore, there is greater possibility for alignment between the Finnish Constitution and republican, as opposed to liberalism.

Basic Rights Constitutionally Protected

Within the Finnish Constitution equality is the right that is given the most weight. The political defining of rights is found in Chapter 2 of the 1999 Constitution.⁶³⁴ In a republican constitution, as explored in Chapter 5, the principal right is equality. Chapter 2 of the Finnish Constitution is heavily based on the 1919 Constitutional Act.⁶³⁵ The first right to be mentioned in both these documents is equality. In addition, Section 6 of Chapter 2 of the 1999 Constitution states that:

Everyone is Equal before the law.

No one shall, without an acceptable reason, be treated differently from other persons on the grounds of sex, age, origin, conviction, opinion, health, disability or other reasons that concern his or her person.

Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.

Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment.⁶³⁶

From the perspective of republican theory, it is not only the fact that equality is the principal right that is noteworthy. The extent of the equality principle found within the 1999 Finnish Constitution is also important. Equality within the Constitution not only includes a wide realm under which people are to be treated as equals. There are also clear stipulations as to the criterion under which people may not be discriminated against. The inclusion of children⁶³⁷ within the Finnish equality rules also moves the equality stipulations of the Constitution beyond that of a great number of other constitutions. Moreover,

⁶³⁴ <http://www.om.fi/21910.htm> (Accessed: 18/10/09).

⁶³⁵ Nousiainen, J. *The Finnish System of Government: From a Mixed Constitution to Parliamentarism.*

http://www.om.fi/Satellite?blobtable=MungoBlobs&blobcol=urldata&SSURIdapptype=BlobServer&SSURIdcontainer=Default&SSURIdsession=false&blobkey=id&blobheadervalue1=inline;%20filename=Nousiainen_en.pdf&SSURIdcontext=Satellite%20Server&blobwhere=1243790092781&blobheadername1=Content-Disposition&ssbinary=true&blobheader=application/pdf (Accessed: 21/10/09).

⁶³⁶ <http://www.om.fi/21910.htm> (Accessed: 18/10/09).

⁶³⁷ Ibid.

the primary difference between the 1919 Rights and Liberties Chapter and that of 1999 is that in the latter, rights and liberties have been extended to include “all persons within the scope of the Finnish legal system, regardless of citizenship”.⁶³⁸

Such a broad concept of equality as a right, with the inclusion of children and individuals who may not be citizens of the state, emphasises the importance of the principle of equality in the Finnish Constitution. As previously noted, equality is the right that republicans regard as most important, as only equal individuals may become citizens and therefore only through there being equality may the republic arise. Republicans believe in both equality before the law and in equality when laws are being developed. Such a concept of equality is also in line with republican ideas surrounding the concept of freedom as non-domination, as it is only through political equality that non-domination may be sustained; as these are intrinsically linked, as opposed to regarded as two distinct concepts.

The other rights that are politically defined in Chapter 2 of the 1999 Constitution include the right to life, personal liberty and integrity; the principle of legality in criminal cases; freedom of movement; the right to privacy; freedom of religion and conscience; freedom of expression and right to access of information; freedom of assembly and freedom of association; electoral and participatory rights; protection of property; educational rights; right's to one's language and culture; the right to work and freedom to engage in commercial activity; the right to social security and protection under the law.⁶³⁹ These rights are in line with the rights that are advocated in a republican constitutional model, as discussed in Chapter 5. Regarding these rights, of particular interest is the fact that there is specific mention given to political, participatory and social rights. These rights include a right to social security, right to vote and right to stand for office. Although these

⁶³⁸ Nousiainen, J. *The Finnish System of Government: From a Mixed Constitution to Parliamentarism*.

http://www.om.fi/Satellite?blobtable=MungoBlobs&blobcol=urldata&SSURIdapptype=BlobServer&SSURIdcontainer=Default&SSURIdsession=false&blobkey=id&blobheadervalue1=inline;%20filename=Nousiainen_en.pdf&SSURIdcontext=Satellite%20Server&blobwhere=1243790092781&blobheadervalue1=Content-Disposition&ssbinary=true&blobheader=application/pdf (Accessed: 21/10/09).

⁶³⁸ <http://www.om.fi/21910.htm> (Accessed: 18/10/09).

⁶³⁹ Ibid.

rights would also be found in most liberal constitutions, they are politically as well as legally defined in Finland. These rights are regarded by the Finnish state as essential for the workings of democracy,⁶⁴⁰ as is the case in republicanism. A politically defined right to social security goes some way towards ensuring that wide economic disparities, which republicans are critical of, due to them affecting the possibility of equality, do not arise. Participatory and political rights to further democracy are also in the interest of republican theory.

In addition, it is important to note that within this Chapter on rights and liberties there are also to be found duties which citizens are held accountable to, for example, the protection of the environment.⁶⁴¹ Such duties align with republicanism, the concept of the active citizens means that individuals have a duty to become involved in the collective decision making process, as the responsibility for the state lies with the people.

Form of Government

The Finnish Constitution states that the form government should take include a separation and balance of power and provisions for mixed government. These provisions are outlined in Section 3 of the Constitution.⁶⁴² The separation of power within the Finnish Constitution includes the combination of parliamentary and presidential government. Such a division is seen as helping to achieve a balance of power, due to the power-base not being held in one place. Such a combination of presidential and parliamentary government, was, in fact, pioneered in Finland in the early years of the twentieth century; with other European countries such as France taking note of their model and using it as a template.⁶⁴³ The primacy of this separation of powers can be noted from the fact that it is first mentioned in Section 3 of Chapter 1: *Fundamental Provisions*:

Section 3 – Parliamentarism and the separation of powers

⁶⁴⁰ <http://www.kansanvalta.fi/en/Etusivu/Oikeudet/Suomalainenoikeusvaltio> (Accessed: 21/10/09).

⁶⁴¹ Section 20 states that *Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone*. <http://www.om.fi/21910.htm> (Accessed: 18/10/09).

⁶⁴² <http://www.om.fi/21910.htm> (Accessed: 18/10/09).

⁶⁴³ Pesonen, P. & Ruhinen, O. *Dynamic Finland – The Political System of the Welfare State*. Helsinki: Finnish Literary Society, (2002), p. 10.

The legislative powers are exercised by the parliament, which shall also decide on state finance.

The governmental powers are exercised by the President of the Republic and the Government, the members of which shall have the confidence of the Parliament.

The judicial powers are exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court as the highest instance.⁶⁴⁴

It is clear from this Section that a mixed government and a balance of power, as advocated by republican theory's constitutional ideas, is also to be found in the Finnish Constitution. Moreover, "with regards to the distribution of power between state organs, the constitution provides a frame within which the general practice may develop in varying directions".⁶⁴⁵ Such a clause is parallel to the constitutional flexibility found in republican constitutional conceptions.

Features of Government

The features of government laid out in the Finnish Constitution give further details as to the structures surrounding mixed government and a balance of power. Details are given as to the system of presidential and parliamentary government. The parliament is unicameral. It consists of two hundred representatives, who are elected for a term of four years at a time. The representatives shall be elected by a direct, proportional and secret vote. The president of the republic is elected by a direct vote for a term of six years. The president of the republic makes decisions in government on the basis of motions proposed by the government. The government consists of the prime minister and the necessary number of ministers. The parliament elects the prime minister, who is thereafter appointed to the office by the president of the republic. The president appoints the other ministers in accordance with a proposal made by the prime minister.⁶⁴⁶ Within the features of government outlined in the Constitution there is also legislation

⁶⁴⁴ <http://www.om.fi/21910.htm> (Accessed: 18/10/09).

⁶⁴⁵ Sundberg, J. & Berglund, S. (eds.) *Finnish Democracy*. Jyväskylä: Gummerus Printing, (1990), p. 31.

⁶⁴⁶ <http://www.om.fi/21910.htm> (Accessed: 18/10/09).

regarding the *rule of law*. Such features are again parallel to republican constitutional conceptions.

The *rule of law* and the procedural matters surrounding its practical implementation are central elements of the Finnish Constitution. Of the 13 Chapters and 133 Sections which make up the Constitution only two Chapters do not stipulate specific legal codifications as to how the state is to be run.⁶⁴⁷ Moreover, in Section 2 of Chapter 1, *Democracy and the Rule of Law*, the importance of the *rule of law* is highlighted.⁶⁴⁸ The Section states:

The powers of the State in Finland are vested in the people, who are represented by the Parliament.

Democracy entails the right of the individual to participate in and influence the development of society and his or her living conditions.

The exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed.⁶⁴⁹

Such a view can again be paralleled to republican theory, as both consider the *rule of law* part of a democratic law making process.

The fact that there is added ease to change the Finnish Constitution when compared to a liberal constitution, as was previously mentioned, is parallel with what is found within republican conceptions of the constitution. This flexibility is again apparent in the features of government. The acceptance of changing circumstances and the need for these to be reflected in the political structure can be noted, with regards to the roles of the parliament and the president, for example. The prominence of both the office of president and of the parliament has changed over time and been altered on numerous occasions as a reflection of the particular political climate of the time.⁶⁵⁰

⁶⁴⁷ Ibid.

⁶⁴⁸ Ibid.

⁶⁴⁹ Ibid.

⁶⁵⁰ For details of what has led to these changes and the specifics of what they have been refer to Nousiainen, J. *The Finnish System of Government: From a Mixed Constitution to Parliamentarism*. http://www.om.fi/Satellite?blobtable=MungoBlobs&blobcol=urldata&SSURIApptype=BlobServer&SSURIContainer=Default&SSURISession=false&blobkey=id&blobheadervalue1=inline;%20filename=Nousiainen_en.pdf&SSURISscontext=Satellite%20Server&blobwhere=1243790092781&blobheadervalue1=Content-Disposition&ssbinary=true&blobheader=application/pdf (Accessed: 21/10/09).

Legal System Advocated

The Finnish state advocates a Supreme Court. Section 3 of Chapter 1 of the Constitution states that “the judicial powers are exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court as the highest instances”.⁶⁵¹ The Supreme Court deals with civil, commercial and criminal matters whilst the Supreme Administrative Court deals with justice in administrative matters. The presence of a supreme court, as discussed in Chapter 5, counters what is generally advocated by republican theory, republicans consider a supreme court undemocratic. However, in the case of Finland, it must be noted that the Supreme Court is only a very recent development, there is no history there of a legal system with a supreme court. In addition, the supreme court can be considered relatively weak when compared to states that have a tradition of supreme court legal systems. Moreover, a supreme constitutional court, as opposed to a higher court dealing with laws passed by parliament, is what is at the heart of the republican critique, the situation in Finland, therefore, does not have to be seen as countering this stance.

The details regarding the Supreme Court and its judges are outlined in Chapter 9 of the Constitution – *Administration and Justice*.⁶⁵² Supreme Court judges are career judges; they are elected by the president and cannot be dismissed from office except by a court order. The fact that they cannot be removed from office by politicians is considered a measure of independence, as politicians do not hold power over the judges there is a greater chance of them not being influenced by politicians in their decision making.⁶⁵³ Moreover, the independence of the judiciary is guaranteed by the Finnish Constitution.⁶⁵⁴ Legal protection is one of the basic rights held by the people of Finland. In order for it to be maintained, the judiciary must be independent.⁶⁵⁵ An independent judiciary is part of the legal system advocated by republican theory as it is part of ensuring that laws are

⁶⁵¹ <http://www.om.fi/21910.htm> (Accessed: 18/10/09).

⁶⁵² <http://www.om.fi/en/Etusivu/Julkaisut/Esitteet/TheJudicialSystemofFinland> (Accessed: 21/10/09).

⁶⁵³ Pesonen, P. & Ruhinen, O. *Dynamic Finland – The Political System of the Welfare State*. Helsinki: Finnish Literary Society, (2002), p. 203.

⁶⁵⁴ <http://www.om.fi/en/Etusivu/Julkaisut/Esitteet/TheJudicialSystemofFinland> (Accessed: 21/10/09).

⁶⁵⁵ <http://www.kansanvalta.fi/en/Etusivu/Oikeudet/Suomalainenoikeusvaltio> (Accessed: 21/10/09).

democratic and in the interest of the common good. In addition, people must be equal before the law, thus the right to legal protection would be favoured from a republican perspective.

Other Distinguishing Features

In addition to what has been mentioned in the sections above, there are other distinguishing features of the Finnish Constitution which add to the possibility of aligning it with republicanism. Amongst these other distinguishing features are an emphasis on civil society; active social movements; and a system of ombudsmen. In Finland there is a system of parliamentary ombudsmen in place, the idea behind this system is that it will further promote accountability. The details of the parliamentary ombudsman and two deputy ombudsmen are given in Section 38 of Chapter 4 of the Constitution.⁶⁵⁶ An ombudsmen system is also advocated by republican theory, in line with ideas regarding active citizenship.

In Finland, civil society is regarded as extremely important by the public and the political community. There have even been some who argue that the links between civil society and the state make Finland “a governmental civil society and a civil societal government”.⁶⁵⁷ Civil society and social movements have been significantly active in Finland since the nineteenth century. It is argued that “there are very few countries where citizens have more association membership than in Finland”.⁶⁵⁸ In addition, the prioritising of civic education in Finland goes further towards aligning the Finnish state with republican theory. Civic education and a strong civil society are features which correspond with the republican concept of the active citizen. The fact that in Finland the state promotes the involvement of citizens in the political sphere would be regarded as advantageous by republican theorists. “In Finland the teaching of civic skills is provided in schools and adult education centres. It is important that citizens are able to

⁶⁵⁶ Ibid.

⁶⁵⁷ Pesonen, P. & Ruhinen, O. *Dynamic Finland – The Political System of the Welfare State*. Helsinki: Finnish Literary Society, (2002), p. 284.

⁶⁵⁸ Ibid. p. 89.

assess social-decision-making and the exercise of power”.⁶⁵⁹ The importance of civic education is highlighted by the Finnish state, with the state recognising that active citizenship is necessary for a democracy and that the process of becoming an active citizen is one that takes place through participation in the state.⁶⁶⁰ Such a conception of the active citizen is paralleled with the republican conception of the active citizen discussed in previous chapters.

Implications for Free Speech Legislation

Republican constitutional conceptions would allow for the possibility of restrictions upon speech in the instance of this being necessary for the upholding of political equality. The possibility of such restrictions should not be read as an absence of freedom of speech within a republican constitution. One would still expect to find freedom of speech stipulated in a republican constitution.

Article 12 of the 1999 Finnish Constitution deals with freedom of expression and the right of access to information. It states:

Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinion and other communications without prior prevention by anyone. More detailed provisions on the exercise of freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an Act. Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and readings.⁶⁶¹

Of particular interest for this project is the fact that although this Article clearly sets out a right to freedom of speech; within the same Article the possibilities for restrictions are also laid out. Restrictions upon freedom of speech are more commonly laid out in separate acts, as opposed to in the constitutional document itself. The laying down of the right and the possibility for restrictions within the Article exemplifies the broad realm of possible restrictions in Finland. From the perspective of republican theory, such a possibility for restrictions is beneficial. The specific mention of the protection

⁶⁵⁹ www.kansanvalta.fi/en/Etusivu/Kansalaisvaikuttaminen/Kansalaistaitojenoppiminen (Accessed: 21/10/09).

⁶⁶⁰ Ibid.

⁶⁶¹ <http://www.om.fi/21910.htm> (Accessed: 18/10/09).

of children as a rationale for curbing speech would also be considered beneficial from the perspective of this project; there is an implication of harm avoidance in the term protection.

From a historical perspective, censorship has been heavily present in Finland. During the Swedish (1249-1809) and Russian (1809-1917) occupations, censorship prevailed. Freedom of speech was not established on any level in Finland until after independence in 1917, through the 1919 Constitutional Act.⁶⁶² Restrictions upon speech have continued since then, though, with even the Finnish press facing certain restrictions;⁶⁶³ freedom of the press is regarded as extremely important from the perspective of liberal theory. Freedom of the press is valued by liberal theorists due to the role that they see a free press as playing in a liberal state; through freedom of the press individuals may be informed on issues of relevance and thus be able to freely make political decisions.

6.2 Spain's Constitution

The end of the Spanish Civil War (1936-1939) resulted in General Franco, a right-wing dictator, gaining power. Franco retained power until his death in 1975. Following his death, there was some concern as to what would happen to the Spanish state. Despite these concerns, though, Spain was to achieve what has been considered one of the most successful transitions to democracy witnessed anywhere.⁶⁶⁴ The 1978 Spanish Constitution was crucial to the success of this democratic transition; a Constitution regarded by many as a liberal constitution.⁶⁶⁵

It has been argued by some that the rationale behind building the 1978 Constitution along liberal lines was, in fact, a reaction to the oppression

⁶⁶² Ollila, R. *Freedom of Speech and Protection of Privacy in Convergence of Electronic Communication*. Rovaniemi: Octa Univrsitatis L'Apponiensa, (2001), p. 79.

⁶⁶³ Steinby, T. *In Quest of Freedom – Finland's Press 1771-1971*. Helsinki: Government Printing Centre, (1972), p. 8.

⁶⁶⁴ Heywood, P. *The Government and Politics of Spain*. London: McMillan Press Ltd., (1995), p. 43.

⁶⁶⁵ For examples of this see: Heywood, P. *The Government and Politics of Spain*. London: McMillan Press Ltd., (1995); Garcia Morillo, J. *La Democracia en España*. Madrid: Alianza Editorial, (1996); Sanchez-Teran, S. *La Transición - Síntesis y Claves*. Barcelona: Planta, (2008); Caldes Antonio, J.A. & Walker, G. *La Alternativa Liberal*. S.A.: Editorial Argos Vergara, (1983).

that the Spanish people had suffered under Franco.⁶⁶⁶ Whilst I accept that anti-Franco reactions did, indeed, play a central role in the development of the Constitution along liberal lines, I believe that the time during which the Constitution was formulated also influenced its liberal leaning. By 1978 liberalism had become the dominant ideology in the Western world. Spain, due to the isolation and difficulties it had faced during the Franco regime, was by 1978 far behind other Western countries as far as social and economic developments were concerned. Thus, there was a great desire to do as much as possible to try and advance the country and to do so swiftly. Within this international climate, a liberal constitution would have seemed ideal as the desired effect was inclusion into the economic and political sphere of the liberal West.

Despite these influencing factors that were present during the development of the 1978 Constitution having to be taken into account, it is also necessary to consider a broader historical context in order to assess the rationale behind a liberal constitution in Spain. It is perhaps unfair to brand Spain as only turning towards liberalism in response to Francoist oppression. Serious liberal and democratic advances had been advocated in Spain much earlier than in other Western European countries, as is evident from the 1812 Constitution of Cadiz, which included amongst its articles universal male suffrage. The 1931 Spanish Constitution was also “considered to be one of the most modern and progressive adopted by any democratic country”.⁶⁶⁷ It would seem that, despite the interruption of the Franco years, there existed a history of liberalism in the Spanish political system; a tradition that the 1978 Constitution is regarded as following.⁶⁶⁸ This historical context aside, in accordance with the concept of alignment defined in Chapter 1, I believe that there are parallels between liberalism and the Spanish Constitution; it is this idea that will be explored in the following sections.

⁶⁶⁶ Magone, J.M. *Contemporary Spanish Politics*. London: Routledge, (2004), p. 27.

⁶⁶⁷ Gunther, R. Montero, J.R. & Botella, J. *Democracy in Modern Spain*. London: Yale University Press, (2004), p. 21.

⁶⁶⁸ Tomas I Valiente, F. *La Constitución de 1978*. Madrid: Cátedra de Estudios Hispánicos, (1985), pp. 10-11.

Aim of the Constitution

The Spanish Constitution highlights as its clear aim the establishment of justice, liberty and security.⁶⁶⁹ In addition, it is also clear from its content that the Constitution, as the first and most important product of the popular will, as voted for in a direct referendum, is the main link between the state and the law. In this way, the Constitution sets out to limit the power of the state in order to protect the rights of individuals,⁶⁷⁰ thus maximising non-interference.

From the perspective of liberal theory, in order for this maximisation of non-interference to be feasible, there must be a clear distinction between the public and the private spheres; between those realms in which the state may and may not interfere. The Spanish Constitution states that the personal sphere that it protects is both physical and mental, moral and spiritual.⁶⁷¹ The Constitution sets out to ensure the protection of individuals' private spheres in a number of ways, including the fact that an individual's dwelling may not be entered into without consent or the order of a judge; the protection of secret communications; and an individual's right not to have her image distributed without consent.⁶⁷² These protections of the private sphere are stated in Article 18 of the Constitution; which also guarantees a right to personal and family intimacy.⁶⁷³ When coupled with Article 39 of the Constitution, which states that public powers must ensure the social, economic and juridical protection of the family, the delineating of and protection over a private sphere becomes clear within the 1978 Constitution.

What the Constitution Does

The Constitution establishes the rights which a citizen has and what the state can and cannot do with regard to them. The way in which these rights are to be protected is also highlighted. In addition, Article 9 of the Constitution states that public bodies must not only promote a meaningful standard of citizens' rights but that they must also remove any obstacles that may hinder

⁶⁶⁹ Ibid.

⁶⁷⁰ Garcia Morillo, J. *La Democracia en España*. Madrid: Alianza Editorial, (1996), p. 254.

⁶⁷¹ Ibid. p. 294.

⁶⁷² Ibid. pp. 302-307.

⁶⁷³ Ibid.

them.⁶⁷⁴ The primacy of individual rights within the Spanish state is thus clear. This will be further developed in the sections dealing with rights below.

Primary Focus of the Constitution

In line with what the Constitution does, the main focus of the Spanish Constitution can be regarded as the rights of citizens, these are entrenched in the Constitution and particularly hard to remove. What these fundamental rights are will be developed upon in subsequent sections.

Constitutional Formation

The Spanish Constitution can be regarded as having been created in a single founding moment. A referendum of the Spanish people was held in order to ascertain whether the 1978 Constitution would, indeed, be implemented as law. This referendum was considered as validating the Constitution.⁶⁷⁵ From the perspective of liberal ideals on constitutional formation, holding a referendum prior to establishing a constitution as law would be seen as beneficial. The holding of such a referendum could be regarded as the single founding moment in which the people agree to a set of laws to be imposed on them in order to escape the chaos of the *state of nature*. From a liberal perspective it is through this agreement that the people can ensure their liberty, as the dangers of the *state of nature* are averted. This agreement also grants validity to the state and government that are spawned from it. The Spanish ideal of the referendum granting validity to the Constitution therefore aids in the alignment with liberalism.

Through having been validated by a direct referendum, the 1978 Constitution is granted the position of the highest law in Spain. It is from the Constitution that all other laws are derived. As a result of being the highest law, the Constitution is also the hardest law to change.⁶⁷⁶ Articles 166 to 169 of the 1978 Constitution deal with constitutional reform; the difficulties in changing the Constitution are laid out here, with measures such as a majority

⁶⁷⁴ Ibid.

⁶⁷⁵ Garcia Morillo, J. *La Democracia en España*. Madrid: Alianza Editorial, (1996), p. 254.

⁶⁷⁶ Ibid. p. 258.

in both Chambers being necessary for any changes to be implemented.⁶⁷⁷ Such entrenchment of the constitutional content is in line with liberal theory.

Concept of Rights Held

The Spanish Constitution can be seen as following a liberal conception of rights; rights are regarded as fundamental. The Spanish Constitution protects the rights of individuals; such protection is considered necessary due to a belief that the rights that individuals hold cannot be breached. It is made clear in the Constitution that the state must not interfere in individuals' social and economic life.⁶⁷⁸ Such concerns with a lack of interference are associated with the delineating of private and public spheres, as discussed above, but also with a conception of liberty as non-interference. This conception of liberty as non-interference is demonstrated by the fact that physical integrity is protected by the Constitution; as a result of which harm to others is against the law.⁶⁷⁹ Such a clause on protection and harm is very much in line with Mill's *harm principle*. The principle of minimal intervention is further highlighted by the fact that there is an acknowledgement of non-legal reprimands for behaviours which although not considered illegal are considered as wrong by society. These reprimands are centred on social condemnation, the validity of which is accepted.⁶⁸⁰

Basic Rights Constitutionally Protected

The Spanish Constitution is concerned with protecting the fundamental freedoms of the individuals who make up the state. Political liberty is the fundamental characteristic of the state; coupled with social and economic liberty.⁶⁸¹ The upholding of these freedoms is regarded as one of the key purposes of the Constitution.⁶⁸² The freedoms that are protected and their corresponding constitutional Articles include: Article 7: Trade unions are to be free to them defending the promotion of the social and economic

⁶⁷⁷ Tomas I Valiente, F. *La Constitución de 1978*. Madrid: Cátedra de Estudios Hispánicos, (1985).

⁶⁷⁸ Garcia Morillo, J. *La Democracia en España*. Madrid: Alianza Editorial, (1996), p. 39.

⁶⁷⁹ *Ibid.* p. 284.

⁶⁸⁰ *Ibid.* pp. 332-336.

⁶⁸¹ *Ibid.* p. 38.

⁶⁸² Sanchez-Teran, S. *La Transición - Síntesis y Claves*. Barcelona: Planta, (2008), p. 277.

interests of their members; Article 10: Personal dignity and free development of individuals personality, alongside respect for the law and the rights of others, is essential to social peace and the political order; Article 15: A right to life and physical and moral integrity; Article 16: Ideological liberty and religious liberty; Article 17: All individuals have a right to their liberty and security; Article 19: People have a right to freely chose where they live and to travel freely within the country, also to enter and exit the country; Article 20: Freedom of speech; Article 21: Right of assembly; Article 22: Right of association; Article 23: Right to political participation and to stand for office; Article 27: Freedom of education; Article 35: Right to freely chose a form of employment.⁶⁸³ Such an extensive list of individual freedoms that the state must uphold is parallel with liberal ideals on individual rights and liberties. In liberal theory there is an extensive list of freedoms that the individual possess and that therefore must not be breached by the state. In addition to this list, other liberties are protected by the Spanish Constitution. In essence, anything that is not illegal is permitted and therefore protected, as anything that is permitted is protected.⁶⁸⁴

Besides this concern with extensive individual freedoms, there is another element of the Spanish Constitution, when it comes to considering basic rights constitutionally protected, that aligns it with contemporary liberal theory. In the constitutional document there is a concern with liberty but also a concern with equality.⁶⁸⁵ Not only is it stated in all the constitutional Articles dealing with liberty that this is to apply equally to all citizens, but Article 14 of the Constitution also indicates that all citizens are equal before the law and must not be discriminated against.⁶⁸⁶ The combining of concerns with liberty and concerns with equality is heavily present in contemporary liberal theory. Although a concern with both liberty and equality is also present in republican theory and a republican constitution, in line with liberalism, the central focus in the Spanish Constitution is with liberty. As was noted in the case of Finland, republicanism has a stronger focus on equality.

⁶⁸³ Tomas I Valiente, F. *La Constitución de 1978*. Madrid: Cátedra de Estudios Hispánicos, (1985).

⁶⁸⁴ Garcia Morillo, J. *La Democracia en España*. Madrid: Alianza Editorial, (1996), p. 324.

⁶⁸⁵ *Ibid.* p. 287.

⁶⁸⁶ Tomas I Valiente, F. *La Constitución de 1978*. Madrid: Cátedra de Estudios Hispánicos, (1985).

Form of Government

According to liberal theory, the form a government should take centres around limited government and a separation of power. In the Spanish Constitution limited government is dealt with in the sections dealing with how to ensure that the state is constrained, with regard to the rights on individuals. The separation of power, meanwhile, is executed through a separate executive, legislature and judiciary.

It has been argued that in the Spanish Constitution there is no clear separation of power. "Instead there exists a deliberate integration of executive and legislature via the government, as defined in Articles 87 and 109-11".⁶⁸⁷ These articles are: Article 87 - the legislative initiative corresponds to the government, the congress and the senate, in accordance with the Constitution and the laws of the chambers. Article 109 – the chambers and their commissioners can get any information or help that they may need from the government and its departments as well as from any government authority and the autonomous communities. Article 110 – (1) the chambers and their commissioners can demand the presence of government members; (2) government members have access to the sessions of the chambers and their commissioners and to be heard by them; they may also ask for members of their departments to be present. Article 111 – (1) the government and each one of its members is submitted to the questions formulated in the chambers. For these debates the rules set out a minimum amount of time per week; (2) each request can lead to a motion in which the chamber can manifest its position.

Despite this argument, there are specific elements within the Constitution that are set out to deal with the separation of power. Articles 68 and 69 of the Constitution establish a congress and a senate.⁶⁸⁸ In addition, Article 67 states that no individual may belong to both these chambers simultaneously.⁶⁸⁹ Such an article, in itself, ensures some level of separation of power. The presence of an independent judiciary through a supreme

⁶⁸⁷ Heywood, P. *The Government and Politics of Spain*. London: McMillan Press Ltd., (1995), p. 89.

⁶⁸⁸ Garcia Morillo, J. *La Democracia en España*. Madrid: Alianza Editorial, (1996).

⁶⁸⁹ Ibid.

court, which will be dealt with in greater detail in the legal system section, also ensures an independent judiciary in line with separation of power theories.

Features of Government

Article 3 of the Constitution establishes Spain as a constitutional monarchy,⁶⁹⁰ with the monarchy having functions as opposed to powers due to its more symbolic role.⁶⁹¹ The prominent feature of government that is found within the 1978 Spanish Constitution is a focus on the *rule of law* (estado de derecho).⁶⁹² Besides this focus, there is also great concern with popular sovereignty.⁶⁹³ Both the *rule of law* and popular sovereignty are features of government that are advocated by liberal constitutional theory, as elaborated upon in Chapter 5.

Through a focus on the *rule of law* the Spanish Constitution ensures that the government makes prior announcements of laws in order for citizens to be legitimately held accountable under these laws. Through the *rule of law* democracy can be constrained and checked; a process that is necessary due to the acceptance both in Spain and in liberal theory that democracy can be unfair.⁶⁹⁴ The ideal of the prior announcement of laws before them being enforceable is also found in liberal theory. Moreover, the idea of the *rule of law*, as discussed in Chapter 5, is one of the features that a liberal government must adhere to. The importance of the constraining democracy element must not be overlooked. Such a feature as constraining democracy is in line with the form of government that is advocated by liberal theory, that of limited government. The idea of the *rule of law* is also heavily present within republican theory, as was noted in the previous chapter, though the republican conception differs from the liberal one. A republican conception of the *rule of law* is concerned with laws developing through a democratic law

⁶⁹⁰ Tomas I Valiente, F. *La Constitución de 1978*. Madrid: Cátedra de Estudios Hispánicos, (1985).

⁶⁹¹ Heywood, P. *The Government and Politics of Spain*. London: McMillan Press Ltd., (1995), pp. 83-85.

⁶⁹² Garcia Morillo, J. *La Democracia en España*. Madrid: Alianza Editorial, (1996), pp. 33-34.

⁶⁹³ *Ibid.* p. 57.

⁶⁹⁴ *Ibid.* p. 33-34.

making process; in liberalism, as in Spain, it refers to being consistent with the constitution.

In addition to the central role of the *rule of law* and popular sovereignty the Spanish Constitution and a liberal constitution both have a deliberative senate and an independent judiciary. The establishment of a deliberative senate is to be found in Article 69 of the Constitution.⁶⁹⁵ The issue of an independent judiciary, meanwhile, is discussed below.

Legal System Advocated

A strong emphasis on legal accountability is to be found in Spain; this degree of accountability is in part a response to the Franco dictatorship and its abuses of power.⁶⁹⁶ Article 117 of the Constitution states that justice emanates from the people and is administered in the name of the King.⁶⁹⁷ Such a conception of justice is in line with liberal ideals relating to constitutional formation and the idea of all agreeing through the constitution to a system of administration that ensures individuals' security.

In addition, Article 123 sets out provisions for a supreme court, the only centralised judicial body in Spain.⁶⁹⁸ With regard to issues of constitutional guarantees, though, the Constitution remains supreme.⁶⁹⁹ As was discussed in Chapter 5, provisions for a supreme court are in line with the legal system that is advocated by liberalism, in part due to it protecting the constitution and its content.

Other elements of the legal system advocated by the 1978 Constitution are in line with both the liberal emphasis on rights and the rigidity with regard to constitutional change. Article 81 of the Constitution asserts that laws relating to the development of fundamental rights⁷⁰⁰ and political liberties of individuals; laws that establish the autonomous regions; and the rest of the laws of the Constitution are Organic Laws (*Leyes*

⁶⁹⁵ Ibid.

⁶⁹⁶ Heywood, P. *The Government and Politics of Spain*. London: McMillan Press Ltd., (1995), p. 103.

⁶⁹⁷ Garcia Morillo, J. *La Democracia en España*. Madrid: Alianza Editorial, (1996).

⁶⁹⁸ Heywood, P. *The Government and Politics of Spain*. London: McMillan Press Ltd., (1995), p. 104.

⁶⁹⁹ Garcia Morillo, J. *La Democracia en España*. Madrid: Alianza Editorial, (1996).

⁷⁰⁰ The specific rights being referred to are not mentioned in this Article, thus one would assume that it means those rights that are constitutionally protected.

Orgánicas); as such they may only be changed through an absolute majority in congress.⁷⁰¹

Other Distinguishing Features

Besides the elements discussed in the sections above, there are other distinguishing features that further align the Spanish Constitution with liberal ideas as to what shape a constitution should take. Amongst these is the fact that there is democracy in Spain, as dictated by Article 1 of the 1978 Constitution. Article 1 declares that the state must be set up as a democracy that promotes as the highest values of its judicial organisation liberty; justice; equality; and political pluralism.⁷⁰² Although a democratic political system is not intrinsic to liberal theory or to liberal constitutional conceptions, it is accepted amongst contemporary liberal theorist that a democratic state should be in place. Besides this feature, in Spain a secular state, welfare policies, and pluralism are also advocated.

Pluralism, as discussed in Chapters 2 and 5, is highly important to liberal theorists. Pluralism is regarded as important due to a belief in various conceptions of the good and due to the role that it plays in individuals' development of their own conception of the good. In the Spanish Constitution there is a wide concern with pluralism.⁷⁰³ The Spanish Constitution not only promotes political pluralism, as mentioned above in Article 1, but also social and linguistic pluralism amongst the different Spanish regions. The corresponding constitutional Articles regarding this pluralism are: Article 3: Regional languages will be officially recognised in the respective regions despite Castilian being the language of the state; Article 6: Political parties express political pluralism, allow for the formation and manifestation of the popular will, and are an instrument of political participation.⁷⁰⁴ Such recognition of pluralism in the Constitution assumes diversity and difference to be of value to society.⁷⁰⁵

⁷⁰¹ Garcia Morillo, J. *La Democracia en España*. Madrid: Alianza Editorial, (1996).

⁷⁰² Tomas I Valiente, F. *La Constitución de 1978*. Madrid: Cátedra de Estudios Hispánicos, (1985).

⁷⁰³ Garcia Morillo, J. *La Democracia en España*. Madrid: Alianza Editorial, (1996), p. 30.

⁷⁰⁴ Tomas I Valiente, F. *La Constitución de 1978*. Madrid: Cátedra de Estudios Hispánicos, (1985).

⁷⁰⁵ Garcia Morillo, J. *La Democracia en España*. Madrid: Alianza Editorial, (1996), p. 44.

Liberalism's belief in pluralism and varied conceptions of the good has been developed into arguments in favour of secularism. Secularism is viewed as safeguarding ideological pluralism with regard to religious beliefs. Only through the separation of church and state can it be ensured that individuals' beliefs are not being prejudiced against. There had been a historical tradition of uniting church and state in Spain. The 1978 Constitution finally ended the relationship between the Catholic Church and the state, with a secular state being advocated instead.⁷⁰⁶ It must be noted that there are, in fact, liberal states that do not adhere to secularism, for example The United Kingdom, Ireland and Norway. Despite these exceptions, though, secularism is something that is generally advocated by liberal theory and generally found in liberal states.

As was noted in Chapter 5, when considering the works of Rawls and Dworkin, contemporary liberal theorists argue in favour of welfare policies in order to reduce inequalities. Despite a market economy and the pursuit of neo-liberal economic policies the 1978 Spanish Constitution also has within it welfare legislation. The corresponding Articles of the Constitution relating to welfare policies are: Article 27: Basic education is obligatory and free; Article 41: Social security system offering unemployment benefits; Article 43: Right to health care; Article 50: Provisions for a state pension.⁷⁰⁷

Implications for Free Speech Legislation

A liberal reading of the Spanish Constitution of 1978 would presume very limited room for restrictions to be placed upon speech. As discussed previously, the liberal ideals of liberty as non-interference and the *marketplace of ideas* result in a strong rationale for there to be virtually no restrictions placed upon speech. In the 1978 Constitution Article 20 deals with free speech, the article states:

1. The following rights are recognised and protected: a) To express and diffuse freely thoughts, ideas and opinions through word, text or any other medium of reproduction. b) To the production and creation of literature, art, science and technology. c) To academic freedom. d) To communicate or freely receive information through any medium of diffusion. The law will

⁷⁰⁶ Magone, J.M. *Contemporary Spanish Politics*. London: Routledge, (2004), p. 51.

⁷⁰⁷ Tomas I Valiente, F. *La Constitución de 1978*. Madrid: Cátedra de Estudios Hispánicos, (1985).

- regulate with regards to professional consciousness and secrecy in the exercising of these liberties.
2. The exercising of these rights cannot be restricted by any previous censoring.
 3. The law will regulate the organisation and the parliamentary control of the mediums of social communication that depend on the state or of any public entity and it guarantees access to said mediums for the social and political groups of significance, respecting pluralism in society and the diverse languages of Spain.
 4. This liberty has its limits with regards to the rights recognised in this Chapter, with respect to the laws that have developed it and, especially, the right to honour, intimacy, one's own image and the protection of youth and childhood.
 5. The retracting of publication, recording and other means of information will only be possible after a juridical resolution.⁷⁰⁸

It is clear from this Article that there is a broad conception of freedom of speech within the Spanish Constitution. Moreover, the strong emphasis placed on rights within the Spanish Constitution, as discussed above, means that a breaching of this Article would be regarded as extremely problematic. There are, then, very limited possibilities for restricting speech within the Spanish Constitution. It has even been argued that in Spain there is almost unlimited freedom of expression.⁷⁰⁹

Besides the first part of the Article, which sets out the realms of free speech, attention should also be paid to the second part of the Article. The reason why it is stated that previous censorship is invalid is closely related to the oppression that was experienced in Spain during the Franco regime. The 1978 Constitution signifies a considerable shift in Spanish history with regard

⁷⁰⁸ “1. Se reconocen y protegen los derechos: a) A expresar y difundir los pensamientos, ideas y opiniones mediante a la palabra, el escrito o cualquier otro medio de reproducción. B) A la producción y creación literaria, artística, científica y técnica. C) A la libertad de la cadra. D) A comunicar or recibir liberalmente información veraz por cualquier medio de difusión. La ley regulara el derecho de la clausa de conciencia y el secreto profesional en el ejerció de estas libertades. 2. El ejerció de estos derechos no puede restringirse mediante ningún tipo de censura previa. 3. La Ley regulará la organización y el control parlamentario de los medios de comunicación social dependientes del Estado o de cualquier ente público y garantizará el acceso a dichos medios de los grupos sociales y políticos significativos, respetando el pluralismo de la sociedad y de las diversas lenguas de España. 4. Estas libertades tienen su límite en el respeto a los derechos reconocidos en este Título, en los preceptos de las Leyes que lo desarrollan y, especialmente, en el derecho al honor, a la intimidad, a la propia imagen y a la protección de la juventud y de la infancia. 5. Solo podrá acordarse el secuestro de publicaciones, grabaciones y otros medios de información en virtud de resolución judicial.” Tomas I Valiente, F. *La Constitución de 1978*. Madrid: Cátedra de Estudios Hispánicos, (1985).

⁷⁰⁹ Ibid. p. 33.

to freedom of speech.⁷¹⁰ As a reactionary measure and in order to avoid state control, censorship is now largely opposed.⁷¹¹

Despite the clear primacy that freedom of speech is granted, it must be acknowledged that there are some legal restrictions upon speech within the Spanish legal system. *Ley Orgánica 1/82*, for example, deals with the right to control the publication of one's own image and the subsequent restrictions which this places on speech. Meanwhile, *Royal Decree 1/89/1982* is concerned with activities deemed as dangerous for youths and infants and films containing such material, the advertising of which is restricted by this Decree.⁷¹² Such restrictions, though, are minimal.

6.3 Conclusion

From the above assessment of the Finnish and Spanish Constitutions in accordance to the categories identified in Chapter 5, it would seem suitable to align the Spanish Constitution with liberalism and the Finnish Constitution with republicanism. In order to exemplify this I have replicated the table designed in Chapter 5. Instead of filling in the table with the views of liberal and republican theory in turn, though, the table has been filled in with the content of the Finnish and Spanish Constitutions.

**Table 6.1:
The Spanish and Finnish Constitutions**

	Spain	Finland
Aim of the constitution	The establishment of justice, liberty and security. Set out the limits of the state's power.	To set up the rules of government in order for citizens to flourish.
What the constitution does	The Constitution establishes the rights which a citizen has and what the state can and cannot do with regards to this.	Ensures that power remains in the hands of the people (Section 2 – Chapter 1)

⁷¹⁰ Ibid. p. 5.

⁷¹¹ Puleo, A.H. *Conceptualizaciones de la Sexualidad e Identidad Femenina: Voces de Mujeres en la Comunidad Autónoma de Madrid*. Madrid: Comunidad de Madrid, (1994), pp. 120-122.

⁷¹² Pizarroso Quintero, A. (ed.) *Livert@dexpresion.es 25 Aniversario de la Constitución Española*. Valencia: Sociedad Estatal de Conmemoraciones Culturales, (2004), pp. 42-43.

Primary Focus of the constitution	The main focus is the rights of citizens, with this being given the most weight in the Constitution.	The institutions of government and how they are to work (Chapters 3, 4 & 5).
Constitutional formation	Referendum held in initial founding moment to validate the Constitution.	Finland had until 2000 a number of constitutional acts – much from these acts remain in place – highlighting the constant development of the Constitution.
Concept of rights held	Liberal conception of negative liberty.	The Constitution can be altered in accordance with circumstances – exceptions can be made even to basic rights.
Basic rights constitutionally protected	Fundamental freedoms (inc. expression, association, residence, strike, demonstration – Articles 7, 10, 15, 17, 19, 20, 21, 22, 23, 27, 35)	Equality is the right given the most weight (Chapter 2). Also life, liberty, movement, freedom of expression and information, association. (Chapter 2)
Form of government	There is no clear separation of power; instead there is a deliberate integration of executive and legislature via the government. (Articles 87 & 109-111)	Separation of powers and provisions for mixed government. (Section 3)
Features of government	Focus on the rule of law (estado de derecho). Popular sovereignty.	Separation of powers, presidential and parliamentary government. Limited term in office.
Legal system advocated	Supreme court.	Supreme court. (Although this is weak and only recently been established). No Supreme Constitutional Court.
Other distinguishing features	Secular state. Pluralism between the regions and to be fostered by political parties (Articles 3 and 6). Welfare policies (Articles 27, 41, 43 & 50)	Emphasis on civil society. Very active social movements. System of Ombudsmen.
Implications for free speech legislation	Broad free speech right granted (Article 20)	Free speech recognised, but at the same time the possibility of restrictions recognised (Article 12)

Chapter Seven

Pornography and the Position of Women in Spain and Finland

Having established that the Spanish Constitution may be aligned with liberalism and the Finnish Constitution with republicanism, in the subsequent two chapters I carry out the case study illustration. I illustrate how a liberal and a republican regime can differ in practice in ways indicated by the theory. The purpose of this chapter is to assess the legislation on pornography and the extent of freedom that pornography has been granted in each of the two countries; paralleling the Spanish case to liberalism and the Finnish case to republicanism. Through this interpretation, I further assess the propositions that:

- *A republican constitution offers a basis for limiting both pornography and racist hate speech while securing a normal range of liberal rights.*
- *Whilst liberals would argue that securing these rights also requires allowing freedom for racist hate speech and pornography.*

In order to interpret the legislation, the background conditions regarding the position and views of women in each of the countries will be briefly explored. Although the aim is not to establish a causal relationship, and it being accepted that numerous factors other than liberalism and republicanism have influenced the legislation in question, an assessment of the background conditions will provide a clearer image of the case study countries. Firstly, I look at the case of Spain and, secondly, I look at the case of Finland.

7.1 Spain

The assessment of this case includes the position of women in Spain, how women are viewed, the extent to which pornography is free and the impact of pornography upon the views of women.

The Position of Women

Traditionally, Spanish society has been considered as having strong elements of machismo; a conception of men as dominant in society; and

women as subordinates and in traditional *female* roles, such as housewives, mothers, and carers. This traditional stereotype, though, is one that is challenged by many within Spain and by numerous political scientists whose work focuses on Spain,⁷¹³ arguing that post-Franco Spain has moved on significantly from this position. They view Spain today as a place where equality is fostered and women and men have the same opportunities, rights and life options. The 1978 Spanish Constitution is credited as a significant force in the achievement of this new found equality between the sexes.

Post-Franco Spain has greatly advanced the position of women. However, it is important to note that women under Franco had been severely oppressed.⁷¹⁴ Hence, despite significant positive changes with regard to the position of women, problems still remain. It has been argued that as far as the legal reforms granting women equality are concerned, Spain achieved in 10 years what other countries took 40 years to complete.⁷¹⁵ Such rapid change was in part possible due to Article 14 of the Constitution, which states that all Spanish citizens are to be treated as equals before the law; that there will be no discrimination due to race, sex, religion or any other personal or social circumstances. In addition, Article 32 states that men and women will have equal status in marital laws, something which had not been the case during the time of Franco.⁷¹⁶ As a result of such Articles, during these 10 years of rapid change contraception became legalised; divorce became legal; children born out of wedlock were granted equal rights; and women no longer had to seek their husband's permission to gain employment.⁷¹⁷

⁷¹³ For examples of this see: Magone, J.M. *Contemporary Spanish Politics*. London: Routledge, (2004); Dahlerup, D. (ed.) *The New Women's Movement – Feminism and Political Power in Europe and the USA*. London: SAGE Publications, (1986); Duran, M.A. *Mujeres y Hombres – La Formación del Pensamiento Igualitario*. Madrid: Editorial Castalia, (1993).

⁷¹⁴ Nunes Puente, S. *Una Historia Propia – Historia de las Mujeres en la España del Siglo XX*. Madrid: Editorial Pliegos, (2004), pp. 12-111.

⁷¹⁵ Dahlerup, D. (ed.) *The New Women's Movement – Feminism and Political Power in Europe and the USA*. London: SAGE Publications, (1986), p. 202.

⁷¹⁶ Tomas I Valiente, F. *La Constitución de 1978*. Madrid: Cátedra de Estudios Hispánicos, (1985).

⁷¹⁷ For examples of works dealing with the progress made with regards to women's equality see: Duran, M.A. *Mujeres y Hombres – La Formación del Pensamiento Igualitario*. Madrid: Editorial Castalia, (1993); Dahlerup, D. (ed.) *The New Women's Movement – Feminism and Political Power in Europe and the USA*. London: SAGE Publications, (1986); Rodríguez Yague, A.C. & Valmana Ochaíta, S. *La Mujer como Víctima: Aspectos Jurídicos y Criminológicos*. Cuenca: Ediciones de la Universidad de Castilla, (2000).

When assessing these changes, the role of the post-Franco state must be recognised. Some of these matters had previously been denied to women, in part, due to the close relationship between the Catholic Church and the Spanish state. The move away from religion and embracing of secularism in the 1978 Constitution facilitated these changes. In addition, in 2004 the *Ley Orgánica 1/2004* was passed, recognising violence against women as a form of discrimination.⁷¹⁸ It should be noted that until 1989 sexual attacks against women had been regarded as crimes against purity. A label of indecent abuses remained on most sexual crimes other than rape until the passing of the *Ley Orgánica 1/2004*. Such labelling can be incredibly damaging to the way in which such crimes are viewed; lessening the significance that should be attributed to them as crimes.⁷¹⁹

In addition to legal developments which grant formal equality to women, there have been other changes favouring the position of women. At the forefront of these changes is the *Ley Orgánica 3/2007*; a requirement that at least 40% of people on political parties' election lists must be women or men, in order to ensure greater equality. This law was developed from a ruling that the *Partido Socialista Obrero Español* (PSOE) had introduced internally during the late 1980s. Other parties followed PSOE in introducing this quota. As a result of this change in the law, during the 2004-2008 Zapatero Administration Spain had the eighth highest percentage of women in a lower chamber of parliament in the world.⁷²⁰ In addition, by 2003 women had, in all of Spain's regional parliaments, gained what is considered to be fair representation, 30% representation (with the exception of Cataluña where representation was 29.6%). These levels of representation are particularly impressive when one considers that in the 1980s the level of representation of women in the Spanish regions averaged below 15%.⁷²¹

⁷¹⁸ Sanz-Diez de Ulzurum Escorianza, J. & Moya Castilla, J.M. *Violencia de Género – Ley Orgánica de Medidas de Protección Integral Contra la Violencia del Género*. Barcelona: Ediciones Experiencia, (2005), p. 13.

⁷¹⁹ Threlfall, M. Cousins, C. & Valiente, C. *Gendering Spanish Democracy*. London: Routledge, (2005), p. 103.

⁷²⁰ Field, B.N. & Hamann, K. *Democracy and Institutional Development – Spain in Comparative Theoretical Perspective*. Basingstoke: Palgrave Mcmillan, (2008), pp. 135-137.

⁷²¹ Ibid. p. 141.

As well as all of the changes noted above, one of the achievements on behalf of women that is highlighted is that women now exceed men in terms of educational achievements. At the time of Franco's death, in 1975, 5% of men and 14% of women were illiterate.⁷²² In 2008, however, the percentage of 20-24 year old females with at least upper secondary education in Spain was 67.6; the percentage for males was 52.7. Despite this improvement, though, it must be noted that these figures remain far below the European Union (EU) average of 81.3% for females and 75.6% for males.⁷²³

Irrespective of this seemingly favourable picture, though, there remain some serious concerns regarding the level of equality achieved by women in Spain. Even when considering the equality that is embedded in the Constitution there is an issue which remains. Article 57 of the Constitution favours male heirs to the Spanish throne over females; moreover, the royal succession in Spain is passed on through the male line. This Article not only hinders the possibility of a woman being head of state,⁷²⁴ but is in itself a sign of inequality between women and men.

There also remain significant inequalities for women when it comes to employment. Women in Spain are paid considerably less for the same jobs as men; the average pay for women in the year 2000 was 25% lower than that of men.⁷²⁵ The rates of unemployment and employment in temporary positions amongst women are also at disadvantageous levels when compared to men. In 2004 it was noted that:

From a gender perspective, men earn more than women. Indeed, the annual average salary for women in 2004 was 71.3% of that of men, and some 48.1% of women earned less than €12,000 while this was the case for only 20.1% of men. When looking at incomes over €30,000, 22.8% of men fell into this category, but only 6.3% of women.⁷²⁶

⁷²² Vosko, L.F. MacDonald, M. & Campbell, I. *Gender and the Contours of Precarious Employment*. London: Routledge, (2009), p. 160.

⁷²³ epp.eurostat.ec.europa.eu (Accessed 10/02/10).

⁷²⁴ Álvarez de la Rosa, M. & Hernández Bravo de Laguna, J. *Estudios Sobre la Constitución Española – Libro Homenaje a Gumersindo Trujillo Fernández*. Madrid: Marcial Press, (2006), pp. 28-29.

⁷²⁵ Threlfall, M. Cousins, C. & Valiente, C. *Gendering Spanish Democracy*. London: Routledge, (2005), p. 175.

⁷²⁶ <http://www.eurofound.europa.eu/ewco/2007/01/ES0701049I.htm> (Accessed 10/02/10).

Levels of unemployment amongst Spanish women, for example, are, when compared to the levels of unemployment of Spanish men, at an 18.6% difference. In addition, Spanish women are 4.2% below the EU average rate of unemployment for women, whereas Spanish men are 0.7% above the EU average.⁷²⁷ A vast number of women who are in paid employment also tend to find themselves in low paid employment, where they are heavily over represented when compared to men, with 43% of women in employment finding themselves in this sector.⁷²⁸ It is important to note, though, that although Spanish women are less likely to be employed than Spanish men, there has been a huge rise in female employment in Spain. In 1985 female employment in Spain was amongst the lowest in the EU, with only one in four women being employed; now it is close to the EU average.⁷²⁹

Women's participation in political parties and as public representatives is also at a much lower level than that of men. In the PSOE in the year 2001, for example, only 28.5% of the workforce was female.⁷³⁰ In addition, despite the election list quotas for male/female representation, after the 2008 election only 36.6% of members of the Spanish parliament were female. Although this is a higher percentage than there had been before, it still signifies an inequality as 63.4% of parliamentary representatives were male.⁷³¹ In the 2009 European Parliament elections, 36% of those elected as representatives from Spain were women, 64% are men. It should be noted, though, that this Spanish result is slightly higher than the EU average at these elections of 35% female and 65% male.⁷³²

These inequality issues have also been reflected in the highly commended law regarding the 40% rule in political party election lists. Despite the quotas, there remain some problems as far as women becoming

⁷²⁷ In accordance with EU Statistic in 2008 for the average for the 27 EU member states percentage of women in employment was 59.1%, for Spain this figure was 54.9%; the equivalent figures for men were EU average: 72.8%, Spain 73.1% epp.eurostat.ec.europa.eu (Accessed 10/02/10).

⁷²⁸ Threlfall, M. Cousins, C. & Valiente, C. *Gendering Spanish Democracy*. London: Routledge, (2005), p. 175.

⁷²⁹ Vosko, L.F. MacDonald, M. & Campbell, I. *Gender and the Contours of Precarious Employment*. London: Routledge, (2009), pp. 159-163.

⁷³⁰ Palomar Olmeda, A. (ed.) *El Tratamiento del Genero en el Ordenamiento Español – Una Visión Multidisciplinaria del Tratamiento de la Mujer en los Distintos Ambientes Sociales*. Valencia: CC.OO, (2005), pp. 417-427.

⁷³¹ www.ipu.org (Accessed 10/02/10).

⁷³² www.europal.europa.eu (Accessed 10/02/09).

elected are concerned. It has been noted that there has been some difficulty in finding sufficient numbers of qualified women to fill these quotas. Women argue, though, that this is not due to lack of ambition on their part but rather due to the fact that they are still forced to choose between either politics or the family. "Despite all the equality laws, historically and socially the public realm is still associated with men".⁷³³ Moreover, those women who do succeed in gaining entry into a political party find themselves in a lower position than men, as the men who were in power are reluctant to loosen their grip on the parties.⁷³⁴

The Spanish welfare state established through the 1978 Constitution also has elements within it which disfavour women. The *social security system* is based upon years of contribution to the state through taxation from years of employment. This arrangement is unfavourable to women due to the unemployment rates for women, but also due to a high percentage of those women who are in employment being in temporary or irregular employment.⁷³⁵ In 2008, the EU average for women in part-time employment was 31.1%, although Spain fares better with only 22.7% of Spanish women in part-time employment, the inequality is clear when one considers that only 4.2% of Spanish men were in part-time employment.⁷³⁶ State pensions are also based on a system which takes into account the number of years an individual was in paid employment; due to the difficulties in gaining employment that there were for women during the Franco years, much of the older generation of women in Spain has been left with very low, if any, eligibility for state pensions.⁷³⁷

Another area of welfare in which women's position is compromised is that of maternity legislation. Although legislation is in place protecting pregnant women, they are often dismissed by their employers. As a result, women tend to give birth when they are either unemployed or out of the

⁷³³ Threlfall, M. Cousins, C. & Valiente, C. *Gendering Spanish Democracy*. London: Routledge, (2005), p. 1.

⁷³⁴ *Ibid.* p. 130.

⁷³⁵ *Ibid.* p. 16.

⁷³⁶ epp.eurostat.ec.europa.eu (Accessed 10/02/10).

⁷³⁷ Threlfall, M. Cousins, C. & Valiente, C. *Gendering Spanish Democracy*. London: Routledge, (2005), p. 71.

labour market. In women aged 16 to 44 who were not in employment 40 out of every 1000 gave birth to a child; this figure drops to 19 out of every 1000 for women with a permanent employment contract and 5 out of every 1000 for women with temporary employment contracts. In addition, in the first six months of 2008 despite there being 250,000 births, only 80,000 maternity leaves were granted.⁷³⁸

With regard to maternity legislation it should be noted that the *Ley Organica 3/2007*, which deals with effective equality between men and women, was in part designed to eradicate discrimination against pregnant women. This law also attempts to tackle the issue of pay disparity between men and women and ensure a fairer balance between men and women regarding family obligations.⁷³⁹ The extent to which this law will be successful remains to be seen. The initiative behind this law, though, was not spurred from a concern within the Spanish political order; rather, it implements two EU directives (2002/73ec and 2004/113/ec).⁷⁴⁰

It would seem from this assessment of the position of women in Spain that despite the advances that have been made since the drawing up of the 1978 Constitution, numerous problems remain that affect the equality of women. According to the 2009 Global Gender Gap report of the World Economic Forum, Spain ranked 17th amongst the countries assessed. The report ranks countries in four different categories. Economic participation and opportunity, in which Spain ranked 90th; educational attainment, in which Spain ranked 56th; health and survival, in which Spain ranked 80th; and political empowerment, in which Spain ranked 9th.⁷⁴¹ This assessment seems to highlight the deficiencies in the position of women assessed above.

How Women are Viewed

It is argued that in today's society, "the exaggerated sexual stereotypes associated with traditional Spain (especially machismo) are not widespread.

⁷³⁸ Vosko, F. MacDonald, M. & Campbell, I. *Gender and the Contours of Precarious Employment*. London: Routledge, (2009), pp. 170-171.

⁷³⁹ http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2007-6115 (Accessed 10/02/10).

⁷⁴⁰ <http://www.freshfields.com/publications/pdfs/2007/apr30/18439.pdf> (Accessed 10/02/10).

⁷⁴¹ <http://www.weforum.org/pdf/gendergap/report2009.pdf> (Accessed 10/02/10).

Differences between the values and beliefs of men and women are narrowing substantially, as are differences between masculine and feminine roles and behaviour”.⁷⁴² This view, though, does not portray the picture of how women are viewed in Spain in its entirety. Although it is clear that the position of women in Spain has vastly improved, it is not as clear whether the view of women in Spain has altered at the same rate. The way in which women are viewed affects their position in society and the levels of equality that they can reach.

During Franco’s rule, a very particular image of women was promoted, “the Franco regime had institutionalized a version of female identity rooted in women’s exclusive role in the patriarchal family”.⁷⁴³ Women were represented as mothers, carers, servants; they were to complement men and give birth to the new generation. The regime created an image of female decency and dignity; of feminine virtues such as subordination, obedience, self-sacrifice and chastity.⁷⁴⁴ The Franco regime’s positioning of women should not be underestimated; some have even gone as far as to argue that the regime carried out a sustained onslaught on the position of women.⁷⁴⁵ The promotion of a view of women as confined to the kitchen and carers of children was aided by the fact that it coincided with traditional Catholic views; the Catholic Church was very influential in Spain at this time. In addition to the dogma the regime was endorsing, mass indoctrination was carried out through compulsory social service courses for women which advocated the ideal of domestic motherhood. Such courses were overseen by the *Seccion Femenina* (Feminine Section), the regime’s women’s organisation.⁷⁴⁶

Thus, “at Franco’s death, Spanish women were still an oppressed gender. Socialised into subordination by the *Feminine Section*, presented

⁷⁴² Gunther, R. Montero, J.R. & Botella, J. *Democracy in Modern Spain*. London: Yale University Press, (2004), p. 136.

⁷⁴³ Radcliff, P. Citizens and Housewives: The Problem of Female Citizenship in Spain’s Transition to Democracy. *Journal of Social History*. Vol. 36, No. 1, (Autumn, 2002), p. 77.

⁷⁴⁴ Sundman, K. *Between the Home and the Institution – The Feminist Movement in Madrid, Spain*. Gothenburg: Goteborg University, (1998), p. 4.

⁷⁴⁵ Threlfall, M. Cousins, C. & Valiente, C. *Gendering Spanish Democracy*. London: Routledge, (2005), p. 16.

⁷⁴⁶ Ibid.

with marriage and motherhood as the only socially acceptable role".⁷⁴⁷ Despite legal changes and formal equality being introduced through the 1978 Constitution, this view of women, which had been so heavily promoted since the 1930s, would obviously be difficult to shift. This shift was hindered by the fact that women were viewed as more entrenched in the Franco regime due to them being rooted in the private sphere, Francoism being associated with the private.⁷⁴⁸ In addition, and perhaps of greater concern, the terms woman and housewife were used interchangeably during the period of democratic transition; the role that had been prescribed for women under Franco was carried through to the new democratic Spain.⁷⁴⁹

The difficulty in shifting these views towards women is apparent in many respects; particularly in that many women still find themselves in traditional family roles, partly as a result of the shortfalls in female employment. Due to women's lesser position in the employment market, in most Spanish households the man is still considered the breadwinner. For example, men's share of household chores is much lower than that of women, which further perpetuates the traditional views of women and femininity. In addition, in contemporary Spain there are low cohabitation rates when compared to other European countries; low numbers of births outside of marriage; low divorce rates and a low percentage of single person households, as offspring tend to continue living with their parents until they themselves marry. All of these issues add to the stereotypes regarding women.⁷⁵⁰

It thus seems that despite the numerous advances with regard to women's equality, there remains much which needs to be done as far as this is concerned. There are two areas in particular where substantial equality is considered a problem. The first of these concerns women's participation in public life, with regard to employment and organisational participation, women in Spain find themselves at a disadvantage when compared to

⁷⁴⁷ Ibid. p. 27.

⁷⁴⁸ Radcliff, P. Citizens and Housewives: The Problem of Female Citizenship in Spain's Transition to Democracy. *Journal of Social History*. Vol. 36, No. 1, (Autumn, 2002), p. 89.

⁷⁴⁹ Ibid.

⁷⁵⁰ Threlfall, M. Cousins, C. & Valiente, C. *Gendering Spanish Democracy*. London: Routledge, (2005), p. 61.

women in other European countries. The second issue revolves around the fact that women work what is referred to as a *double working day*, paid work and then unpaid work at home.⁷⁵¹

The state has attempted to change these views through the *Instituto de la Mujer* (Women's Institute), a body created by the government in 1983 to promote the role of women in Spanish society and politics.⁷⁵² The *Institute* particularly focuses on issues of education, health and employment. Unfortunately, this institution has not proven to be sufficient to produce the changes necessary regarding how women are viewed.

Impact of Pornography on Views of Women

"In ethnographic literature Spain is described as a society which is centrally concerned with male authority, in particular men's ability to control women sexually".⁷⁵³ This particular view of women has been socially constructed, in part due to the historic oppression of women. This view, though, is being furthered by the image of women promoted through pornography.

Spain's flourishing pornographic industry has been heavily focused on what heterosexual men want pornography to be. Although this has changed with the privatisation of pornographic consumption, the main target audience remains the heterosexual man. The privatisation of consumption helps people to overcome social taboos regarding whether they should or should not be viewing pornography. Accessing pornography in one's private sphere, be it on the Internet or television, is not as exposing as attending an X-rated viewing. Irrespective, it was not until 2002 that there was any commercial interest by the industry towards the female audience; 2002 being the first year where a stand aimed at women appeared in the FCEB (Barcelona Erotic Film Festival).⁷⁵⁴

Women began to play a part in the production of pornography to some significant level as writers of erotic literature. During the 1980s and 1990s,

⁷⁵¹ Ibid. p. 62.

⁷⁵² Magone, J.M. *Contemporary Spanish Politics*. London: Routledge, (2004), p. 235.

⁷⁵³ Sundman, K. *Between the Home and the Institution – the Feminist Movement in Madrid, Spain*. Gothenburg: Goteborg University, (1998).

⁷⁵⁴ www2.controlpublicidad.com/en_profundidad/opinion/object.php?o=35538 (Accessed 13/02/09).

there was a surge in female authors producing erotic works. This shift was regarded by some as a sign of Spain's liberalisation.⁷⁵⁵ It has also been noted, though, that these female authors⁷⁵⁶ have also aided in the commercialisation and commodification of sex whilst also reinforcing "traditional male fantasies about women".⁷⁵⁷

However, it is not only the portrayal of women in the Spanish pornographic industry that may be considered a problem. In line with pornification, similar images of women are disseminated through the media. Women are heavily represented in the Spanish media; however, they are underrepresented in senior media positions. In addition, the Spanish media tends to represent women in either traditional roles such as housewives, or, to sexualise women and turn them into semi-naked hostesses. Apart from "restrictions on associating alcohol consumption with sexual success, there is little or no regulation of sex on TV, and this fact has had significant repercussions for the representation of women".⁷⁵⁸ This trend of traditional gender roles being promoted is also evident in Spanish television advertising, advertising is regarded as a lagging social indicator of gender roles, where most women are portrayed as housewives whilst most men are portrayed as professionals. Women are used to advertise toiletries and household cleaning products, whilst men are used to advertise ideas and service goods.⁷⁵⁹

Ley Orgánica 1/2004, which deals with violence against women, also deals with the way in which violence against women is portrayed in mediums of communication. Article 14 of this law states that the communication medium will promote the protection of equality between men and women, avoiding all discrimination between them. In addition, objectivity should be

⁷⁵⁵ Esteves, C. (ed.) *Relatos Eróticos*. Madrid: Castalia, (1990), pp. 10-11.

⁷⁵⁶ Such authors include: Susana Constante, Almudena Grandes, Isabel Franc, Mercedes Abad, Ana Rossetti, Lourdes Ortiz.

⁷⁵⁷ Gilkion, J. From Taboos to Transgression: Textual Strategies in Women Authored Spanish Erotic Fiction. *The Modern Language Review*. Vol. 94. No. 3, (Jul., 1999), p. 719.

⁷⁵⁸ Brooksbank Jones, A. *Women in Contemporary Spain*. Manchester: Manchester University Press, (1997), p. 123.

⁷⁵⁹ See: Royo, M. Aldas, J. Kuster, I. & Vilo, N. *Sexism and Gender Role Portrayals in Spanish TV Commercials*. Valencia: Univercidad de Valencia, (2001); Valls-Fernandez, F. & Martinez-Vicente, J.M. Gender Stereotypes in Spanish Television Commercials. *Sex Roles*. Vol. 56, No. 9-10, (May, 2007).

guaranteed in the diffusion of information regarding violence against women, alongside the dignity of the victims.⁷⁶⁰ This legislation, though, is not sufficient to tackle the issue of the views of women portrayed in the media as it is too limited. The view of women as housewives and subordinates is not merely being represented through Spanish pornography, but throughout the media in general.

Pornography

Spain may be regarded as a highly pornified society. Spain's pornographic industry was aided by sex under the Franco regime being portrayed as for procreation only. Thus, as soon as pornography became available, it largely being banned during Franco's rule, an interest quickly emerged.⁷⁶¹ Censorship of pornography ended in 1977, with hardcore pornography being legalised in 1984.⁷⁶² By the late 1970s sex shops and hardcore pornography became available.⁷⁶³ Today, Spain has one of the largest pornographic industries in the world; the 170 pornography films produced in Spain in 2007 made it the fourth biggest pornographic industry in the world.⁷⁶⁴ In addition to home grown production, Spain is also the gateway into Europe for pornography produced in the USA. The number of pornographic films which appear on the Spanish market each year is estimated at 1000, with these being sold from 85,000 outlets.⁷⁶⁵ In addition, it is also estimated that there are 400,000 pornography websites hosted in Spain.⁷⁶⁶ Moreover, Spain has also seen a significant rise in the production of erotic and pornographic

⁷⁶⁰ Los medios de comunicación fomentarán la protección y salvaguarda de la igualdad entre hombre y mujer, evitando toda discriminación entre ellos. La difusión de informaciones relativas a la violencia sobre la mujer garantizará, con la correspondiente objetividad informativa, la defensa de los derechos humanos, la libertad y dignidad de las mujeres víctimas de violencia y de sus hijos. En particular, se tendrá especial cuidado en el tratamiento gráfico de las informaciones. http://noticias.juridicas.com/base_datos/Admin/lo1-2004.html (Accessed 17/02/10).

⁷⁶¹ Brooksbank Jones A. *Women in Contemporary Spain*. Manchester: Manchester University Press, (1997) p. 112

⁷⁶² Slade, J.W. Pornography in the Late Nineties. *Wide Angle*. Vol. 19, Issue 3, (1997), p. 5.

⁷⁶³ Brooksbank Jones, A. *Women in Contemporary Spain*. Manchester: Manchester University Press, (1997), p. 112.

⁷⁶⁴ www.blogpeliculas.com/2008/08/25/espana-es-la-cuarta-potencia-del-cine-porno/ (Accessed 13/02/2009).

⁷⁶⁵ <http://terrannoticias.terra.es/cultura/articulo/espana-industria-sexo-factura-euros-2569137.htm> (Accessed 13/02/2009).

⁷⁶⁶ <http://www.elmundo.es/2007/08/04/indice.html> (Accessed 13/02/2009).

literature since the 1980s.⁷⁶⁷ Spain's pornographic industry is estimated to generate €470,000,000 per annum and employ around 2,300 people.⁷⁶⁸ Spain also hosts a number of festivals in honour of the pornographic film industry, the most renowned is the *Festival del Cine Erotico de Barcelona - FCEB* (Barcelona Erotic Film Festival). When the FBCE first took place in 1993, 1,500 people attended. By the year 2002, this figure had risen to 40,000.⁷⁶⁹ This vast pornographic industry is supported by a vast number of consumers. It is estimated that in the year 2000 850,000 people in Spain watched pornography, of whom 45% are considered to be habitual users. In addition, it is estimated that 38% of Internet users in Spain in 2001 used the Internet to look at pornography.⁷⁷⁰

Despite this prolific pornographic industry, there is little regulation in place in Spain. Article 20 of the 1978 Spanish Constitution states that:

1. The following rights are recognised and protected: a) To express and diffuse freely thoughts, ideas and opinions through word, text or any other medium of reproduction. b) To the production and creation of literature, art, science and technology. c) To academic freedom. d) To communicate or freely receive information through any medium of diffusion. The law will regulate with regards to professional consciousness and secrecy in the exercising of these liberties.
2. The exercising of these rights cannot be restricted by any previous censoring.
3. The law will regulate the organisation and the parliamentary control of the mediums of social communication that depend on the state or of any public entity and it guarantees access to said mediums for the social and political groups of significance, respecting pluralism in society and the diverse languages of Spain.
4. This liberty has its limits with regards to the rights recognised in this Chapter, with respect to the laws that have developed it and, especially, the right to honour, intimacy, one's own image and the protection of youth and childhood.
5. The retracting of publication, recording and other means of information will only be possible after a juridical resolution.⁷⁷¹

⁷⁶⁷ Gilkison, J. Taboos and Transgression: Textual Strategies in Woman-Authored Spanish Erotic Fiction. *Modern Language Review*. Vol. 94, No. 3, (Jul., 1999), p. 718.

⁷⁶⁸ See: www.eluniversal.com.mx/vi_517014.html (Accessed 13/02/09); actualidad.terra.es/sociedad/articulo/espana-industria-sexo-factura-euros-25961.html (Accessed 13/02/09); www.lavanguardia.es/lv24h/20080623/53487113772.html (Accessed 13/02/2009).

⁷⁶⁹ <http://pedrocalleja.blogia.com/2006/072107-doble-x-20-anos-de-cine-porno-made-in-spain.php> (Accessed 05/02/10).

⁷⁷⁰ www.mscperu.org/porno_espana.htm (Accessed 13/02/09).

⁷⁷¹ "1. Se reconocen y protegen los derechos: a) A expresar y difundir los pensamientos, ideas y opiniones mediante a la palabra, el escrito o cualquier otro medio de reproducción. B) A la producción y creación literaria, artística, científica y técnica. C) A la libertad de la cadra. D) A comunicar or recibir liberalmente información veraz por cualquier medio de difusión. La ley regulara el derecho de la clausa de conciencia y el secreto profesional en el ejerció de estas libertades. 2. El ejerció de estos derechos no puede restringirse mediante ningún tipo de censura previa. 3. La Ley

In addition to such a strong commitment to freedom of speech, pornography itself is covered by a very limited number of restrictions. A Constitutional Tribunal dealing with the issue of pornography stated in 1982 that pornography was not an attack on public morality, and thus could not be restricted.⁷⁷² Pornography, though, has not been clearly defined under Spanish legislation. The Ministry of the Interior accepts that it is not easy to determine what is to be considered pornography; with the ministry putting forward two opinions on the matter: A) Material that consists of a content that is only libidinous, intends to excite sexually, and pays attention to the normal steps of a sexual representation. B) Material that lacks any literary, artistic, scientific or educational value and the only fixation is sexual.⁷⁷³ The Ministry also acknowledges that it would be very difficult to determine that material was pornographic in accordance with definition B due to the primacy that material with any literary, artistic, scientific or educational value is given in

regulará la organización y el control parlamentario de los medios de comunicación social dependientes del Estado o de cualquier ente público y garantizará el acceso a dichos medios de los grupos sociales y políticos significativos, respetando el pluralismo de la sociedad y de las diversas lenguas de España. 4. Estas libertades tienen su límite en el respeto a los derechos reconocidos en este Título, en los preceptos de las Leyes que lo desarrollan y, especialmente, en el derecho al honor, a la intimidad, a la propia imagen y a la protección de la juventud y de la infancia. 5. Solo podrá acordarse el secuestro de publicaciones, grabaciones y otros medios de información en virtud de resolución judicial.” Tomas I Valiente, F. *La Constitución de 1978*. Madrid: Cátedra de Estudios Hispánicos, (1985).

⁷⁷² Relacionando pornografía y ataque contra la moral pública: El Tribunal Constitucional en STC 62/1982, de 15 de octubre: " ... la pornografía no constituye para el Ordenamiento jurídico vigente, siempre y en todos los casos, un ataque contra la moral pública en cuanto mínimo ético acogido por el derecho, sino que la vulneración de ese mínimo exige valorar las circunstancias concurrentes, entre ellas, muy especialmente tratándose de publicaciones, la forma de publicidad y de la distribución, los destinatarios -menores o no-, e incluso si las fotografías calificadas contrarias a la moral son o no de menores, pues no cabe duda que cuando los destinatarios son menores -aunque no lo sean exclusivamente- o cuando éstos son sujeto pasivo y objeto de las fotografías y texto, el ataque a la moral pública y por supuesto a la debida protección a la juventud y la infancia, cobra una intensidad superior". (pornography does not constitute for the existing judicial body, always and in every case, an attack against public morality in as much as the minimal ethics of the right, rather the violation of that minimum demands an evaluation of the circumstances, in amongst these, specifically regarding publications, the mode of publication and distribution, those who will see the publications – minors or not -, including whether the photographs regarded as contrary to morality are or are not of minors, as there is no doubt that when the material is intended for minors – even if not exclusively – or when these are a passive subject and object of the photographs and text, the attack on public morality and the corresponding protection of youth and infancy, overrule). www.mir.es (Accessed 04/02/10).

⁷⁷³ No es sencillo determinar lo que se ha de considerar como material o publicación de carácter pornográfico. Dos opiniones aparecen contrapuestas: A) Únicamente ha de tenerse presente el contenido exclusivamente libidinoso, tendente a la excitación sexual y atentatorio a las pautas normales de una representación sexual. B) Ha de fijarse la atención en la carencia de todo valor literario, artístico, científico, educativo, y su exclusiva fijación sexual. http://www.mir.es/SGACAVT/respuestas/seg_ciudadana/i200696.html (Accessed 04/02/10).

Article 20. This lack of definition further limits the possibility of restrictions upon pornography.

The question of whether pornography is an attack on public morality or not is relevant from a legal perspective in Spain as public morality is regarded as something that the Constitutional Tribunal has a duty to protect, as laid out in Article 8.3 of the *Ley Orgánica 1/1996*.⁷⁷⁴ The Constitutional Tribunal has mentioned public morality as a legitimate rationale for restricting freedom of expression, as a result of which the sexual content of some artistic and literary material has been examined.⁷⁷⁵ In STC 62/1982,⁷⁷⁶ for example, whereby a book was deemed as inappropriate due to its sexual content; it must be noted, though, that the publication in question was aimed at children. In part, the protection of public morality has been attributed to the historical ties between the Spanish state and the Catholic Church. Neither this coupling with the Church's views nor a protection of public morality seem in line with liberal theory. The Constitutional Tribunal, though, has been careful to highlight the fact that due to a commitment to pluralism, a value that is in line with liberalism, public morality cannot be equated with the views of the religious majority. As a result, the use of public morality as a rationale for restricting freedom of expression has tended to be limited to the protection of children.⁷⁷⁷

The lack of definition of pornography is highlighted by the fact that when cases of possible restrictions have been dealt with by the Constitutional Tribunal the material in question has been referred to as obscene. What is to be considered as obscene is itself not clearly defined. However, there is a general understanding that it concerns exhibitions of a sexual character in public. What has been restricted has tended to be displays of genitalia and masturbation.⁷⁷⁸ The rationale behind these

⁷⁷⁴ http://noticias.juridicas.com/base_datos/Privado/lo1-1996.html (Accessed 05/02/10).

⁷⁷⁵ Minteguía Arregui, I. *Sentimientos Religiosos, Moral Pública y Libertad Artística en la Constitución Española de 1978*. Madrid: Editorial Dykinson, (2006), p.309.

⁷⁷⁶ <http://ocw.usal.es/ciencias-sociales-1/derecho-a-la-informacion/contenidos/SENTENCIAS/2do%20BLOQUE/PDF/STC%2062-1982,%20de%2015%20de%20octubre.pdf> (Accessed 17/06/10).

⁷⁷⁷ Minteguía Arregui, I. *Sentimientos Religiosos, Moral Pública y Libertad Artística en la Constitución Española de 1978*. Madrid: Editorial Dykinson, (2006), pp. 344-355.

⁷⁷⁸ *Ibid.* pp. 387-388.

restrictions seems, initially, to be alignable with liberalism. The focus on the obscene is in line with what the radical feminists find problematic in the liberal position. Moreover, the Constitutional Tribunal, through Article 186 of the *Ley Orgánica 10/1995*, is opposed only to public displays of obscene material, due to the possibility of it being accessed by minors.⁷⁷⁹

The only restriction upon the production and distribution of pornography that has been consistently maintained in Spain regards pornography including or aimed at minors. Point 4 of Article 20 is a clause protecting children from material which although not restricted for adults could be damaging to a child. These restrictions surrounding the corruption of minors through pornography, though, did not include punishment for the possession of such material, merely for the production and sale/distribution, until 2004. *Ley Orgánica 15/2004* criminalised the possession of pornography containing children, with a penalty of six months to two years in prison legislated as appropriate.⁷⁸⁰ It is interesting to note that there are no restrictions upon pornography involving animals, and that despite this legislation being in place Spain is thought to be the second biggest sharers of internet child pornography in the world.⁷⁸¹

Liberal theory, as discussed in Chapter 2, allows for more restrictions to be placed upon public utterances of speech than on the production of speech. In Spain, in accordance with Law 55-2007, commonly known as the *cinema law*, films and other audiovisual works that are of a pornographic character or that apologise for violence will be classified as X-rated. The classification is assigned by the Ministry of Culture. X-rated films may only be shown in X-screens, into which minors (those under 18 years of age) will not be allowed.⁷⁸² This law is an extension on the *Royal Decree 1067/1983* which decriminalised the commercialisation of pornography and initiated the X-ratings.⁷⁸³ These restrictions via X-rating, though, have not been extended

⁷⁷⁹ http://noticias.juridicas.com/base_datos/Penal/lo10-1995.12t8.html (Accessed 06/05/10).

⁷⁸⁰ www.noticias.juridicas.com/base_datos/Penal/lo15-2003.html# (Accessed 04/02/10).

⁷⁸¹ See: www.elconfidencial.com/cache/2008/12/12/sociedad_50_espana_entre_mayores_consumidores_pornografia_infantil_internet.html (Accessed 05/02/10); www.unafuente.com/27-12-2009/es-mexico-principal-productor-de-pornografia-infantil-en-el-mundo-gerardo-sauri/ (Accessed 05/02/10).

⁷⁸² www.noticias.juridicas.com/base_datos/Admin/155-2007.htm (Accessed 04/02/10).

⁷⁸³ ww2.controlpublicidad.com/en_profundidad/opinion/object.php?o=35538 (Accessed 13/02/09).

by the Ministry of Culture to include websites. Therefore, there is a vast amount of pornography not covered by the *cinema law*, as it is estimated that 80% of Spain's pornography is online.⁷⁸⁴

It would seem that liberalism and the Spanish Constitution can be aligned, with liberalism providing a rationale for limited restrictions upon pornography. As previously mentioned, there are numerous factors that have influenced this legislation, but as the purpose of this assessment is not to demonstrate a causal relationship these will not be examined further.

7.2 Finland

The case of Finland will now be assessed. Any differences that are identified between the two cases should aid with the drawing of conclusions regarding the differences between a state with a liberal constitution and a state with a republican constitution towards the issues involved.

The Position of Women

Finland is regarded as a state where there is vast equality between men and women. Section 6⁷⁸⁵ of the 1999 Finnish Constitution clearly states that there shall be equality between all Finnish citizens, with discrimination along lines of sex not permitted. This provision has, in fact, been in place since the Constitutional Act of 1919. In the case of Finland it would also seem that equality is not merely formal.

Finland was the first European country, and the second country in the world, to grant women the right to vote; it doing so in 1906, at the same time as most men in Finland were granted the right to vote.⁷⁸⁶ In addition, when Finnish women were granted the vote, they were also granted the right to run for public office. In the first unicameral parliament, elected in 1907, 9.5% of

⁷⁸⁴ www.elmundo.es/papel/2007/08/04/uve/2168562.html (Accessed 13/02/09).

⁷⁸⁵ "Everyone is Equal before the law. No one shall, without an acceptable reason, be treated differently from other persons on the grounds of sex, age, origin, conviction, opinion, health, disability or other reasons that concern his or her person. Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development. Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment" <http://www.om.fi/21910.html> (Accessed 25/02/10).

⁷⁸⁶ Pesonen, P. & Ruhinen, O. *Dynamic Finland – The Political System of the Welfare State*. Helsinki: Finnish Literary Society, (2002), p. 31.

elected representatives were women.⁷⁸⁷ The first female cabinet minister was elected in Finland in 1926.⁷⁸⁸ The percentage of female parliamentarians remained around the 10% mark until the 1950s, after which it began to steadily increase.⁷⁸⁹ In 2009 the first female president was elected and Finland had the highest percentage of women (60%) in the cabinet of any country in the world; 40% female representation in the national parliament; and 62% female representation in the European Parliament.⁷⁹⁰ These numbers place Finland above the EU average for all of these categories, demonstrating the advantageous position that Finnish women find themselves in when compared to other states. Women's political success has been aided by Finland's proportional representation electoral system, which means that female candidates can be personally voted for. When coupled with high voting turnout amongst women, women voting at the same level as men since the 1950s, and women demonstrating a preference for female candidates, the result has been significant parliamentary representation for women.⁷⁹¹

The position of women in Finland may be at such a high standard due to the commitment to equality in the Finnish Constitution. As noted in the previous chapter a commitment to substantive equality is one of the aligning elements between the Finnish Constitution and republicanism. Equality between men and women is not merely mentioned in Section 6 of the 1999 Constitution, there are numerous other legal articles that tackle the issue. The principal legal Act regarding equality between men and women is the *Act on Equality between Women and Men, Act 609/86*. This Act came into force in 1987 and had three major aims: the prevention of sex discrimination, the promotion of equality between women and men, and the improvement of women's status, with a particular focus on working life. The Act was amended in 1992 to include discrimination on the basis of pregnancy and

⁷⁸⁷ Ministry of Social Affairs and Health. *Gender Equality Policies in Finland*. Helsinki, (2006), p. 5.

⁷⁸⁸ Keranen, M. (ed.) *Gender and Politics in Finland*. Aldershot: Avebury, (1992), p. 13.

⁷⁸⁹ Ministry of Social Affairs and Health. *Gender Equality Policies in Finland*. Helsinki, (2006), p. 5.

⁷⁹⁰ epp.eurostat.ec.europa.eu (Accessed 23/02/10).

⁷⁹¹ Kittilson, M.C. (ed.) *Challenging Parties, Changing Parliaments – Women and Elected Office in Contemporary Western Europe*. Columbus: The Ohio State University Press, (2006), p. 107.

family care responsibilities.⁷⁹² In 2005, further amendments were made giving more precise instructions on workplace gender equality plans. In accordance with the amendments, every employer with at least 30 employees must have a gender equality plan in place, including pay comparisons.⁷⁹³ Discrimination on the basis of gender is also prohibited in the Employment Contracts Act and the Penal Code; with discrimination being defined as “unfair treatment of a person or class of persons in comparison to others”,⁷⁹⁴ both direct and indirect discrimination are taken into consideration. In addition, gender impact is assessed at the start of any law drafting project; with this assessment requirement extended to include the Government Budget in 2007.⁷⁹⁵ This concern with equality when drawing up laws is in line with the republican view of political equality assessed in previous chapters.

The issue of gender equality has been debated in Finland for a considerable amount of time; the modern debate on the issue starting in the 1960s, when a significant shift away from agriculture took place. Finland had, until then, been a largely agricultural society.

In an urbanised society both women and men work outside the home. It was also emphasised that women and men should have equal roles in looking after the family, have a right to gainful employment and be able to have an influence in society on an equal basis. It was also stressed that it was the responsibility of the government to provide social protection and services.⁷⁹⁶

This early debate was followed by a reform programme by the Committee on the Status of Women in 1970, and the founding of the Council for Equality in 1972 to implement these reforms. Besides the Council for Equality there are numerous other bodies that are involved in implementing a government’s gender equality policies. Gender equality policy implementation is coordinated by the Ministry of Social Affairs and Health. In addition, nearly all other ministries, local authorities, and numerous public institutions, such as universities and the Finnish Broadcasting Company, have a gender equality

⁷⁹² Finland Forward without Discrimination Project, *Equality Act – a toolkit against discrimination*, Helsinki, (2004) www.join.fi/seis (Accessed 25/02/10).

⁷⁹³ Ministry of Social Affairs and Health. *Gender Equality Policies in Finland*. Helsinki, (2006), p. 12.

⁷⁹⁴ Finland Forward without Discrimination Project, *Equality Act – a toolkit against discrimination*, Helsinki, (2004) www.join.fi/seis (Accessed 25/02/10).

⁷⁹⁵ Ministry of Social Affairs and Health. *Gender Equality Policies in Finland*. Helsinki, (2006), p. 8.

⁷⁹⁶ *Ibid.* p. 4.

group working within them.⁷⁹⁷ The Finnish Parliament also has an *Employment and Equality Committee* that is responsible for gender equality issues.

Besides the above mentioned legislation, the Finnish welfare system is structured to ensure that there is no inequality between men and women. “The objective is that women and men should have equal rights, obligations and opportunities in all fields of life”.⁷⁹⁸ A considerable part of the welfare provisions to ensure equality between men and women revolve around reconciling work and family life. To try and achieve a balance between men and women with regard to family life, provisions are in place for family leave from employment for both men and women. An example of such provisions is publically funded day-care in order to ensure that parents have the opportunity to either study or work.⁷⁹⁹

In addition to gaining substantive levels of equality both in political participation and political representation, Finnish women are also fairly represented in the employment market, a fact that was aided by Finnish women being encouraged to enter the paid labour force during World War II. Most Finnish women are in paid employment; moreover, in 2008 only 18% of Finnish women were in part-time employment.⁸⁰⁰ When assessing the position of women in comparison to that of men, substantive equality does indeed seem to be in place. Finland has the most gender balanced workforce in the EU; 69% of Finnish women are employed, in comparison to 73.1% of men. Although a disparity remains, it should be noted that the employment rate of Finnish women is far above the EU average of 59%.⁸⁰¹

Despite these great successes with regard to equality between men and women, though, one must not negate the fact that some issues remain to be resolved. For example, high numbers of Finnish women may be in full time employment, but when it comes to high positions in business, academia

⁷⁹⁷ Ibid. p. 7.

⁷⁹⁸ Finnish Institute of Occupation Health <http://www.ttl.fi/internet/english> (Accessed 15/02/10).

⁷⁹⁹ Ministry of Social Affairs and Health. *Gender Equality Policies in Finland*. Helsinki, (2006), p. 13.

⁸⁰⁰ epp.eurostat.ec.europa.eu (Accessed 24/02/10).

⁸⁰¹ Ibid.

and the sciences, these remain largely filled by men.⁸⁰² In 2005, 22% of the highest management positions in public administration were held by women; 25% of managers in the private sector were women; 20% of the highest positions in universities were held by women; and 33% of judges were women, although the first female Supreme Court President was appointed in 2006.⁸⁰³ In addition, there remain pay disparities between men and women, with Finnish women earning 80% of what their male counterparts earn.⁸⁰⁴ Although this disparity may be reduced by the inclusion in the 1999 Constitution of a clause stating that pay differences between the genders will no longer be supported and the government target of reducing the gap between men's and women's pay by 5% by 2015.⁸⁰⁵

Despite there being some problems, it should be noted that the issues faced by women in Finland are minor compared to those faced by women in other countries. It is therefore possible to claim that a considerable level of substantive equality between men and women has been reached in Finland. The favourable position of Finnish women is reflected by the assessment of the 2009 Global Gender Gap report of the World Economic Forum in which Finland ranked second amongst the countries assessed. As indicated earlier, the report ranks countries in four different categories. Economic participation and opportunity, in which Finland ranked 15th; educational attainment, in which Finland ranked 1st; health and survival, in which Finland ranked 1st; and political empowerment, in which Finland ranked 2nd.⁸⁰⁶

How Women are Viewed

In this section, I interpret the impact that the levels of equality between men and women achieved in Finland have had on the way in which women are viewed. It has been argued that the stories that build the national identity of Finland, the myth of the nation, differ from those of other countries. In most

⁸⁰² Kittilson, M.C. (ed.) *Challenging Parties, Changing Parliaments – Women and Elected Office in Contemporary Western Europe*. Columbus: The Ohio State University Press, (2006), p. 105.

⁸⁰³ Ministry of Social Affairs and Health. *Gender Equality Policies in Finland*. Helsinki, (2006), p. 9.

⁸⁰⁴ epp.eurostat.ec.europa.eu (Accessed 23/02/10).

⁸⁰⁵ Ministry of Social Affairs and Health. *Gender Equality Policies in Finland*. Helsinki, (2006), p. 12.

⁸⁰⁶ <http://www.weforum.org/pdf/gendergap/report2009.pdf> (Accessed 25/02/10).

countries it is accepted that the authors and principal actors of such stories are male. "Finland's national narrative is uniquely gender inclusive...in fact, women were co-authors of this text".⁸⁰⁷ This co-authorship, though, did not circumvent a particular role being sketched out for women. The role that was ascribed to women, irrespective of women's part in developing the image of this role, was that of highly skilled caretakers.⁸⁰⁸ Although the inclusion of women in the development of the national narrative is exemplary of the advantageous position that Finnish women find themselves in, particularly when compared to women in other countries, disadvantages for women nonetheless arose.

Finnish women's exceptional position of agency in shaping Finnish national identity afforded them a degree of power in state development, but only within the confines of the skilful caretaker role. Those women who stepped outside of that image and its implications, particularly in their analysis of equality and male-female relations, have much more difficulty in establishing political legitimacy for their goals.⁸⁰⁹

Partly as a result of this narrative construction, a particular image of women was created. Despite the welfare provisions that have been implemented in Finland, in an attempt to achieve equality between men and women in the work place as well as the home, inequalities remain. For example, although parental leave is available to men and women, the majority of it is taken by women.⁸¹⁰ With regard to questions of employment, besides the pay disparity issues that were discussed in the previous section, there are also certain careers which are still seen as *women's work*, including basic education, health care, social welfare and administrative roles.⁸¹¹ In addition, in Finnish politics, women have had a disproportionate representation when it comes to particular sectors. In the cabinet, for example, women have disproportionately been in positions dealing with welfare and social services.⁸¹² Representations of women in these roles has also been evident on Finnish television. In 1994 the Finnish Broadcasting Company launched a five year

⁸⁰⁷ Marakowitz, E. Gender and National Identity in Finland – an Exploration into Women's Political Agency. *Women's Studies International Forum*. Vol. 19, Nos. 1-2, (1996), p. 56.

⁸⁰⁸ Ibid.

⁸⁰⁹ Ibid.

⁸¹⁰ Ministry of Social Affairs and Health. *Gender Equality Policies in Finland*. Helsinki, (2006), p. 13.

⁸¹¹ Keranen, M. (ed.) *Gender and Politics in Finland*. Aldershot: Avebury, (1992), p. 38.

⁸¹² Marakowitz, E. Gender and National Identity in Finland – an Exploration into Women's Political Agency. *Women's Studies International Forum*. Vol. 19, Nos. 1-2, (1996), p. 55.

project to assess gender portrayals. The project not only revealed that women are under-represented in Finnish television, amounting to 21% of actors, but also that women tended to be portrayed as concerned with issues such as healthcare.⁸¹³

The Finnish state is attempting to redress these issues of narrative. Besides the legislation that is in place to ensure that there is no discrimination between the genders, there have also been concerns about how men and women are portrayed and the role of these portrayals in issues of equality. As a result of these concerns, Finnish education policy states that “students should be encouraged in guidance to make non-traditional educational and vocational choices...a change in family roles should also be encouraged”.⁸¹⁴ The aim of this policy is to achieve gender neutrality.

Impact of Pornography on Views of Women

In Finland pornography has increased since the 1970s, with regard to supply, variability, and accessibility.⁸¹⁵ It is estimated that whilst in 1992 8% of Finnish men had viewed a pornographic video in the last year; by 1999 this had increased to 15.3%. The corresponding figures for women were 1.1% in 1992 and 3.2% in 1999.⁸¹⁶ This increase has partly been attributed to attitudes towards nudity and the acceptance of this within Finnish culture.⁸¹⁷

An area of concern that has been identified with regard to pornography and the sex industry in general is that of racism in the sex trade. In advertisements for prostitution, escort services, sex shops and bars, pornographic publications and telephone sex lines there seems to be a focus on the ethnic background of the women involved. It should be noted that ‘Finnishness’ was used as a marketing point. Irrespective of the fact that the foreign population of Finland is only 2%, 11% of prostitution adverts refer to

⁸¹³ Finnish Broadcasting Company yle.fi/gender/imart/html (Accessed 16/02/10).

⁸¹⁴ Holm, G. From Policy to Practice: Finnish Education Policy and the Portrayal of Men and Women in Guidance Books. *Scandinavian Journal of Education Research*. Vol. 32, Issue 3, (Sept, 1988), pp. 117.

⁸¹⁵ Traeen, B. Spitznogle, K. & Beverfjord, A. Attitudes and use of Pornography in Norwegian Population 2002. *Journal of Sex Research*, (May, 2004).

⁸¹⁶ Haavio-Mannila, E. Kontula, O. & Kuusi, E. *Trends in Sexual Life*. Helsinki: The Family Federation of Finland, (2001), pp. 263-264.

⁸¹⁷ Traeen, B. Spitznogle, K. & Beverfjord, A. Attitudes and use of Pornography in Norwegian Population 2002. *Journal of Sex Research*, (May, 2004).

non-Finns.⁸¹⁸ In addition, no adverts seem to refer to Russian or Baltic women, although trafficking of women from these parts is a recognised problem in Finland.⁸¹⁹ It has been argued that the inclusion of Finnishness as a selling point in the sex industry may be related to ideas of Finnish women as superior to those from Eastern Europe. Finnish women were considered as less likely to carry any Sexually Transmitted Infections, for example.⁸²⁰ These issues are concerning with regard to Finnish attitudes towards foreigners, in particular attitudes towards foreign women. The position of women in Finnish society and the way in which women are viewed, though, seems to not have been heavily affected by the rise in pornographic consumption in Finland.

Pornography

As noted in Chapter 6, although Article 12⁸²¹ of the 1999 Finnish constitutional document sets out the right to free speech, the possibility of limitations upon this right are also laid out in the Article. It is therefore not necessarily surprising that pornography legislation in Finland is much tougher than in other European countries. Until 2001, when a new Act on Classification of Audiovisual Programmes came into force, all pornographic videos were banned. This new Act reduced the limitations on pornography; allowing pornographic films to be distributed as long as they did not depict children, animals or violence.⁸²² The Finnish Penal Code (Chapter 17, Section 18) states that:

A person who offers for sale or for rent, distributes, or to that end manufactures or imports, pictures or visual recordings depicting children, violence or bestiality

⁸¹⁸ Keller, L. & Jyrkinen, M. Racism in the Sex Trade in Finland. *NIKK Magasin*. No.1, (2002).

⁸¹⁹ Penttinen, E. *Globalizatio, Prostitution and Sex-Trafficking*. London: Routledge, (2008).

⁸²⁰ Keller, L. & Jyrkinen, M. Racism in the Sex Trade in Finland. *NIKK Magasin*. No.1, (2002).

⁸²¹ "Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinion and other communications without prior prevention by anyone. More detailed provisions on the exercise of freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an Act. Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and readings." <http://www.om.fi/21910.htm> (Accessed 23/02/10).

⁸²² Hanninen, H. *The Money Streams in Retail Business of Pornography in Finland*. The Third Baltic Sea Women's Conference on Women and Democracy. Tallinn, (Feb, 2003).

in an obscene way, shall be sentenced for *distribution of depictions of obscenity* to a fine or to imprisonment for at most two years.⁸²³

Moreover, section 20 of this Chapter of the Penal Code also has provisions for people not to be exposed to pornography against their will. Stating:

A person who, for gain, markets an obscene picture, visual recording or object which is conducive to causing public offence, by

- (1) giving it to a person under 15 years of age;
- (2) putting it on public display;
- (3) delivering it unsolicited to another; or
- (4) openly offering it for sale or promoting it by advertisement, brochure or poster or by other means causing public offence, shall be sentenced for *unlawful marketing of obscene material* to a fine or to imprisonment for at most six months.

(2) A sentence for unlawful marketing of obscene material shall also be passed on person who, in the manner referred to in paragraph (1)(4), offers for sale or promotes an obscene text or sound recording which is conducive to causing public offence.⁸²⁴

The 2001 Act was set out to uphold these provisions whilst terminating advance censorship. The Act was also designed to ensure that the Board of Film Classification certified the legality of material to be released. Therefore, all films must be classified by the Board in advance of being shown.⁸²⁵

The Penal Code does not mention pornography; rather, it talks about sexually obscene pictures and audio-visual recordings. In order to facilitate the enactment of the above mentioned legislation, the Finnish Board of Film Classification clearly defines what is meant by pornography, the definition stating that:

A pornographic audio-visual programme, often also referred to as adult entertainment, can be defined for example as a description where people are handled only as sexual beings. A pornographic movie is an action movie where only the sexual organs function. Pornography is often divided into two different categories by the manner of presentation: 1. Soft-core pornography, where sexual acts are simulated, inexplicit or cut or limited so that the spectator does not know whether an actual intercourse takes place or not and 2. Hard-core pornography, depicting real sexual acts in close-ups. Most pornographic audio-visual programmes are hard-core pornography.⁸²⁶

Pornography depicting children, those under the age of 18, and animals is considered easier to identify than violent pornography. In order to ascertain what is to be considered as violent pornography the following definition is provided:

⁸²³ www.finlex.fi/pdf/saadkaan/E8890039.PDF (Accessed 16/02/10).

⁸²⁴ Ibid.

⁸²⁵ Finnish Board of Film Classification <http://www.fsf.de/fsf2/international/bild/ecofc03/finland.pdf> (Accessed 16/02/10).

⁸²⁶ <http://www.vet.fi/english/porno.php> (Accessed 16/02/10).

The depiction of an audio-visual programme meets the criteria of an actual assault if the markings of the assault can be clearly noticed in the body and behaviour of the person.

These acts include for example sticking with needles, burning, whipping (violet marks). Bondage is not as such forbidden, but if the binding makes for example the breasts turn violet, it has to be deemed an assault. Even milder acts are to be condemned if the person subject to the acts clearly participates against his or her will.⁸²⁷

Chapter 17, Section 19 of the Finnish Penal Code criminalises possession of pornographic material depicting children. The extent to which this law has been used in Finland goes beyond what could be aligned with liberalism; further highlighting the rationale behind the alignment with republicanism. It is generally accepted from a liberal perspective that material which has artistic value should be granted greater protection from speech restrictions. In Finland, though, under Section 19 of Chapter 17 of the Penal Code an art exhibition which, according to the artist, critiqued child pornography on the Internet, was removed by police. It was argued that some of the images that were on display, which the artist had obtained from the Internet, were actually child pornography.⁸²⁸ This move by the police was criticised by liberals in Finland who argued that such topics should not be beyond critique.

Besides these legislations, the Finnish government has shown growing concern over the question of pornography. This concern is partly derived from legislation being difficult to implement; a grey economy existing in the industries that distributed outlawed material. The most common reason for material being outlawed by the Board of Film Classification in the year 2001-2002 was violent content in pornographic material.⁸²⁹ Due to these concerns and concerns over the pornification of public spaces, a phenomenon that, as discussed in the Introduction, has been witnessed in the majority of Western countries, the Finnish Council for Gender Equality financed a study in 2002 to assess the impact of pornography in Finland. The study was called *Money streams in Pornography*. "The aim of the study was to survey what kind, where, and how much pornography there is in Finland at

⁸²⁷ Ibid.

⁸²⁸ <http://www.hs.fi/english/article/Police+confiscate+art+exhibit+as+child+pornography+/1135234155292> (Accessed 17/05/10).

⁸²⁹ Finnish Board of Film Classification <http://www.fsf.de/fsf2/international/bild/ecofc03/finland.pdf> (Accessed 16/02/10).

the beginning of the 21st Century”.⁸³⁰ The study focused on the retail side of the pornographic industry, as there is no notable commercial pornographic industry or pornographic production industry in Finland. The study ascertained that in 2001 approximately 740,000 pornographic magazines were sold in Finland; these sales created revenue of €5.9 million. This figure amounts to 2% of total magazine sales in Finland; a figure that has been declining since the 1980s. The study found that the consumption of pornographic videos, on the other hand, had increased. The data on video material, though, was limited due to pornographic videos having been banned in Finland until 2001, and therefore only distributed illegally until then. With regard to Internet pornography the study estimates that 30 pornographic sites were hosted in Finland, but that the majority of pornography accessed in Finland originated from abroad. The showing of pornography on television remains restricted to paid for television channels. The study concludes that hardcore pornography is harmful to gender equality due to it objectifying women, and that therefore further restrictions should be considered.⁸³¹

The issue of foreign hosted Internet sites with pornographic material has become a particular concern for the Finnish government; as they are hosted in other countries these websites are not restricted by the strict Finnish legislation. In 2005 the Ministry of Communication began a project to censor foreign hosted websites that offered pornographic material banned under the Finnish Penal Code, with a particular focus on material depicting children. This became legislation in 2007 when *Bill HE 99/2006* was passed. A list of 1,700 restricted sites was drawn up and Internet Service Providers were then asked to censor these sites; in the instance of them not doing so then the authorities would intervene.⁸³² This policy, though, has been heavily criticised due to claims that at least 1,000 of the 1,700 websites on the list did not contain material that is banned under the Finnish Penal Code. The

⁸³⁰ Hanninen, H. *The Money Streams in Retail Business of Pornography in Finland*. The Third Baltic Sea Women's Conference on Women and Democracy. Tallinn, (Feb, 2003).

⁸³¹ Ibid.

⁸³² Kimppa, K., *Censorship: Case Finland*, Turku: University of Turku, (2008) tucs.fi/publications/attachment.php?fname=inpKimppa08a.pdf (Accessed 16/02/10).

most notorious example of this criticism was the inclusion in the list of the website lapsiporno.info (childporn.info). Despite its name, the website did not contain any pornographic material; rather, it had been set up to critique this new legislation and merely contained a discussion on the legality of the bill.⁸³³ Irrespective of the criticisms that have been made against this legislation on Internet material, it clearly demonstrates the extent to which pornography is restricted in Finland.

7.3 Conclusion

From the assessment of the level of freedom granted to pornography in both Spain and Finland the propositions of this thesis seem to stand. Despite the position of women in Spain being considerably poorer than that of men there, and despite Spanish society being considerably pornified, the possibilities of restrictions upon pornography remain limited. There are a number of reasons as to why this is the case, historical and cultural reasons amongst others. Irrespective, though, a liberal reading of the Constitution provides a rationale when considering why restrictions have not been placed upon such speech. The alignment between the Spanish Constitution and liberalism proposed here is based on a number of parallels that result in the Spanish Constitution having a strong focus on freedom, including freedom of expression, and it leaving incredibly limited possibilities for restrictions upon pornography. The only restrictions in place prohibit child pornography and limit public displays of pornography, although the issue of the accessibility by children is referred to when considering public displays. Arguments regarding restrictions upon public displays in Spain, when public morality has been at stake, have involved issues of pluralism. Arguments in favour of pluralism may be aligned with liberalism's focus on numerous conceptions of the good as an argument sustaining freedom of speech. As was discussed in Chapter 2, there is some acceptance within liberalism for arguments in favour of restricting public displays of pornography; whilst the private consumption of such material is regarded as beyond the reach of the state.

⁸³³ Ibid.

The position of women in Finland is far more favourable than that in Spain; Finnish society also does not seem to have been pornified to the same levels as Spanish society. Yet, there are considerably more possibilities for restrictions upon pornography in Finland. The alignment with republicanism provides a rationale as to why Finland's Constitution allows for a number of different legislations being in place that limit the amount of pornography that is available. The limitations that are in place in Finland go beyond the prohibition of child pornography and include restrictions on violent pornography. Moreover, the arguments in favour of these restrictions can be regarded as concerned with both equality and non-domination. The attention that is given to the impact of violent pornography is of particular interest to this project; as restrictions upon violent pornography are advocated by the radical feminist stance that is being used as a model. The fact that the Finnish legal system has implemented these restrictions upon violent pornography would seem to suggest that such restrictions would be possible from a republican stance. The rights of women meanwhile, seem to remain secured despite these restrictions. Equality, for example, being successfully achieved there.

Besides what can be done through the law in both of these countries, it can also be argued that a liberal and a republican legal culture are also reflected in the broader legislation and social attitudes of each country. This position seemingly further improving the position of women and possibility of restrictions upon pornography in Finland when compared to Spain. It cannot be denied that the views of women in each of these countries are clearly affected by much more than liberalism and republicanism can account for. Oppression under the Franco regime, for example, still proves detrimental to Spanish women. The role that pornography has played in furthering negative views of women is harder to ascertain. In accordance with the radical feminist stance, though, the negative view of women in Spain is being furthered by women being silenced through pornography. In the instance of pornography being restricted there would be greater possibility for these inequalities to be redressed. The issue of redressing inequalities could be regarded as having been enacted in Finland, where restrictions upon

pornographic speech were softened in 2001. Despite the lifting of these restrictions, though, due to the position that women had already achieved the harm caused by the speech has been limited.

Chapter Eight

The Extreme Right in Spain and Finland

In this chapter a background will be given as to the situation regarding the extreme right in the two case study countries; Spain will be considered first and then Finland. Extreme right speech and legislation regarding it will then be assessed. As mentioned in the previous chapter, there are numerous reasons as to why legislation has developed in the way that it has in each case; including historical reasons and background conditions. It is a reading through liberalism and republicanism, though, that is being attempted here; thus, although a brief assessment of these other conditions will be provided the purpose will merely be to facilitate an understanding of the cases. The focus in this chapter will be on the kind of arguments that have been considered as acceptable for restricting or permitting racist hate speech and the possibility of aligning these with liberalism and republicanism.

Concerns over the growth of the extreme right are a central motivation of this project, as elaborated upon in the Introduction. The level and history of the extreme right in Spain and Finland form part of the rationale for selecting them as the case study countries to be assessed. The extreme right, in both of these countries, has received little attention due to its activities being considered as limited when compared to other European countries. Spain and Finland are amongst the European countries where the extreme right has had some of the lowest electoral success.⁸³⁴ This limited electoral impact is set against a history of extreme right successes. In Spain, Franco's extreme right dictatorship remained in place for 36 years. Finland, meanwhile, was considered "one of the fascist core countries" during the inter-war years.⁸³⁵ This history of extreme right success, in turn, leads to another similarity between the two cases. The extreme right in these countries has predominantly not consisted of the so-called new right, present in Europe as an ideology since the 1960s and the source of the extreme right

⁸³⁴ Rodríguez Jiménez, J.L. *Nuevos Fascismos? Extrema Derecha y Neofascismo en Europa y Estados Unidos*. Barcelona: Ediciones Península, (1998), p. 309.

⁸³⁵ Pekonen, K. (ed.) *The New Radical Right in Finland*. Kопijyva: The Finnish Political Science Association, (1999), p. 63.

revival in the 1980s.⁸³⁶ This new right was partly based on a European identity and a European historical myth; including links to Europe's pagan past.⁸³⁷ In both Finland and Spain, the extreme right has tended to look back to its own achievements. Despite this backward looking stance, though, there is concern in both countries regarding new right organisations.⁸³⁸

8.1 The Extreme Right in Spain

The extreme right in Spain has generated little interest due to its lack of electoral success, moreover, little public interest has surrounded the extreme right as a problem or possible problem in Spanish politics.⁸³⁹ This lack of interest has been considered by some as surprising due to Spain's extreme right history and Franco's lengthy dictatorship; it being presumed that in a state where the reality of the extreme right had been experienced concerns over its possible resurgence would remain.⁸⁴⁰ Lasting concerns over the extreme right after its successes have been witnessed in other countries such as Germany. It is perhaps because of the Franco dictatorship, though, that the extreme right has generated little interest. The Spanish citizenry desired change and democracy after its many years under Franco. As mentioned in Chapter 6, the transition to democracy was smooth and successful.

After the death of Franco, the Spanish extreme right was divided; by 1976 four different groups were claiming to be the descendants of Franco's *Falange Española*; these were the Spanish National Front (*Frente Nacional Español* - FNE), Authentic Spanish Falange (*Falange Española (auténtica)* - FEa), National Syndicate Coordinating Junta (*Junta Coordinadora Nacional Sindicalista* - JCNC), and the violent Guerrillas of Christ the King

⁸³⁶ Casals, X. *La Tentación Neofascista en España*. Barcelona: Plaza Janes, (1998), p. 108.

⁸³⁷ Ibid.

⁸³⁸ For Finland see: Pekonen, K. (ed.) *The New Radical Right in Finland*. Kopenhaagen: The Finnish Political Science Association, (1999), p. 31. For Spain see: Rodríguez Jiménez, J.L. *La Extrema Derecha Española en el Siglo XX*. Madrid: Alianza Universidad, (1997), p. 204.

⁸³⁹ See: Cheles, L. Ferguson, R. & Vaughan, M. (eds.) *The Far Right in Western and Eastern Europe*. London: Longman, (1995), p. 91; Rodríguez Jiménez, J.L. *La Extrema Derecha Española en el Siglo XX*. Madrid: Alianza Universidad, (1997), p. 13.

⁸⁴⁰ For examples see: Gilmour, J. *Life under and After Franco: The Contrasting Fortunes in Spain of the Right and the Extreme Right since the Civil War*. *Occasional Paper Series*. University of Bristol, No. 31, (October, 1999). Cheles, L. Ferguson, R. & Vaughan, M. (eds.) *The Far Right in Western and Eastern Europe*. London: Longman, (1995).

(*Guerrilleros de Cristo Rey*).⁸⁴¹ Regardless, the extreme right attempted to regain a position during the process of democratic transition; something that proved very difficult. In the 1977 election all the extreme right groups together only managed to poll 0.6% of the national vote.⁸⁴² The most successful party was *Alianza Nacional 18 de Julio*, which defended Franco and his regime, polling 0.36% of the national vote.⁸⁴³ No extreme right party, though, succeeded in having a candidate elected into either chamber of parliament. These dismal results seemed to suggest that the extreme right had seen the end of its support in Spain; in the 1979 elections, though, they managed to increase their support from 0.6% to 2.2% of the national vote.⁸⁴⁴ The increase in support resulted in an extreme right candidate being elected in Madrid, Blas Piñar López the leader of *Fuerza Nueva*. *Fuerza Nueva* had been active during the Franco regime.⁸⁴⁵ Blas Piñar López did not succeed, though, in being re-elected. In the 1982 election he only received 0.5% of the vote, lost his seat and dissolved the party.⁸⁴⁶ It is generally accepted that the extreme right lost its position after its failed coup against the government in 1981.⁸⁴⁷ Rather than receiving any form of popular support, the people of Spain protested against the coup.⁸⁴⁸

The failed coup, however, did not mark the end of the Spanish post-Franco extreme right. Although extreme right activities have been less significant than some would have expected, they have not been nonexistent. It has been argued that due to the Franco dictatorship the Spanish extreme right was not as adept as that in other countries at dealing with the democratic system.⁸⁴⁹ Due to Franco's dictatorship, the new right that has

⁸⁴¹ Cheles, L. Ferguson, R. & Vaughan, M. (eds.) *The Far Right in Western and Eastern Europe*. London: Longman, (1995), p. 92.

⁸⁴² Ibid. p. 93.

⁸⁴³ Ibid.

⁸⁴⁴ Ibid.

⁸⁴⁵ Rodríguez Jiménez, J.L. *La Extrema Derecha Española en el Siglo XX*. Madrid: Alianza Universidad, (1997), pp. 337-370.

⁸⁴⁶ Gilmour, J. *Life Under and After Franco: The Contrasting Fortunes in Spain of the Right and the Extreme Right since the Civil War*. *Occasional Paper Series*. University of Bristol. No. 31, (October, 1999), p. 7.

⁸⁴⁷ Cheles, L. Ferguson, R. & Vaughan, M. (eds.) *The Far Right in Western and Eastern Europe*. London: Longman, (1995), pp. 94-95.

⁸⁴⁸ Ibid. p. 94.

⁸⁴⁹ Casals, X. *Neonazis en España – De las Audiciones Wagnerianas a los Skinheads (1966-1995)*. Barcelona: Grijalbo, (1995), pp. 294-295.

experienced success in numerous European countries could not be conceived in Spain until after Franco's death. In addition, the pagan myth promoted by the new right found little foothold in Spain, where the right had traditionally been linked to the Catholic Church.⁸⁵⁰

It was not until the 1980s that the new right began to gain any momentum in Spain.⁸⁵¹ However, the economic growth that Spain was experiencing in the 1980s aided in limiting the success of the extreme right. There was no significant discontent amongst the people. Throughout this decade the Spanish extreme right did not obtain any elected representatives. In addition, despite the slowing economic growth and eventual negative growth in the early 1990s, the extreme right fared no better in elections.⁸⁵² It is argued that during the 1990s, extreme right parties only represented a token presence in Spanish elections. One of the parties that is regarded as an example of this insignificant presence was the FEa, which in the 1996 national elections only received 12,000 votes.⁸⁵³

In fact, since Blas Piñar López's election in 1979, no Spanish extreme right party has managed to gain an elected representative in the parliament, the senate, or the European parliament. In the late 1990s, to try and combat these failures, the Spanish extreme right parties attempted to form new alliances amongst themselves, as well as with extreme right parties in other European countries. Amongst the first of these groupings was the *Frente Social Español*, an amalgamation of six small extreme right parties that came together in 1997.⁸⁵⁴ In advance of the 2000 national elections a new alliance was forged to create *Plataforma España 2000*, which was formed by *Democracia Nacional*, *Partido Nacional de los Trabajadores*, *Movimiento Social Republicano* (previously *Alternativa Europea*) and a collection of smaller parties. Despite receiving the support of France's Jean Marie Le

⁸⁵⁰ Rodríguez Jiménez, J.L. *La Extrema Derecha Española en el Siglo XX*. Madrid: Alianza Universidad, (1997), p. 17.

⁸⁵¹ Casals, X. *La Tentación Neofascista en España*. Barcelona: Plaza Janes, (1998), p. 93.

⁸⁵² Cheles, L Ferguson, R. & Vaughan, M. (eds.) *The Far Right in Western and Eastern Europe*. London: Longman, (1995), pp. 101-103.

⁸⁵³ Gilmour, J. *Life Under and After Franco: The Contrasting Fortunes in Spain of the Right and the Extreme Right since the Civil War*. *Occasional Paper Series*. University of Bristol. No. 31, (October, 1999), p. 8.

⁸⁵⁴ The Stephen Roth Institute for the Study of Contemporary Antisemitism and Racism, Tel Aviv University www.tau.ac.il/Anti-Semitism/CR.htm (Accessed 13/04/10).

Pen's *Front National*, though, the group only managed to poll 0.4% of the national vote. Other extreme right groups which ran at these elections achieved similarly low percentages of the vote. The *Frente Social Español* formed part of the *Frente Español*, created in the year 2002 in advance of the 2004 national elections. Like its predecessor, though, it failed to achieve any significant support at the elections; irrespective of the fact that besides Le Pen, Italy's *Forza Nuova* was also now offering them support.⁸⁵⁵

As has been the case in other European countries, it should be noted that the Spanish extreme right has fared better at local as opposed to national elections. In 1999, for example, the *Grupo Independiente Liberal* gained a number of seats at the municipal elections in Marbella.⁸⁵⁶ Although the *Grupo* failed to obtain any seats at the 2000 national elections, it received 71,914 votes (0.31%).⁸⁵⁷ A region that has seen more extreme right activity than others in Spain has been Cataluña. A party that seems to be increasing in popularity there is *Plataforma per Catalunya* (PxC). Despite only having been formed in 2002, at the 2003 local elections they had four councillors elected; by 2007 this had risen to 17 councillors and three county councillors. PxC runs on a strong anti-immigration policy, with a particular focus on the negative impact of Muslim immigrants.⁸⁵⁸

Besides the activities and results of extreme right parties at elections there have been, since the death of Franco, a number of extreme right organisations that have not registered as political parties but have had some notable moments. Of particular interest for this project are the activities of Spanish Circle of Friends of Europe (*Círculo Español de Amigos de Europa* - CEDADE), a neo-Nazi organisation founded originally in the Federal Republic of Germany in 1965. CEDADE moved to Barcelona in 1966,⁸⁵⁹ producing neo-Nazi literature and revisionist history, predominantly focusing on Holocaust denial. The extreme right speech published by CEDADE will be discussed at greater length in the following section. Unlike other Spanish

⁸⁵⁵ Ibid.

⁸⁵⁶ Ibid.

⁸⁵⁷ Ibid.

⁸⁵⁸ www.pxcatalunya.com (Accessed 15/04/10).

⁸⁵⁹ Cheles, L. Ferguson, R. & Vaughan, M. (eds.) *The Far Right in Western and Eastern Europe*. London: Longman, (1995), p. 97.

extreme right groups CEDADE was not inspired by Franco but by German National Socialism.⁸⁶⁰ In 1979 CEDADE registered the *Partido Europeo Nacional Revolucionario* as a political party.⁸⁶¹ Despite growing popularity in the 1980s CEDADE was riddled with internal conflict; it eventually dissolving in November 1993, having failed to obtain any electoral successes.⁸⁶² After CEDADE dissolved, many of its members joined other extreme right organisations, including groups, such as *Democracia Nacional*, which were also looking to forge alliances with new right groups in other European countries.⁸⁶³ Neo-Nazi groups in Spain had been influenced by Nazi party members and collaborators who sought and obtained refuge in Spain after World War II.⁸⁶⁴

Besides CEDADE, another organisation which attempted to revive the extreme right in Spain during the 1980s and 1990s was *Bases Autonomas*, an organisation founded in Madrid in 1983. *Bases Autonomas* published a number of magazines with extreme right propaganda, including racist propaganda, such as *La Peste Negra*. Besides such publications, *Bases Autonomas* also carried out violent attacks throughout the 1980s and 1990s against left wing political groups.⁸⁶⁵ Much of the violence carried out on behalf of *Bases Autonomas* was undertaken by the neo-Nazi and skinhead groups that were allied with the organisation.⁸⁶⁶

A strong focus on Franco as a figurehead has meant that, as with the development of the new right, the neo-Nazi movements that developed in other European countries in the 1960s also found little foothold in Spain. Neo-Nazis in other European countries were heavily influenced by the Klu Klux Klan in the USA; such influences were ineffective amongst the Catholic

⁸⁶⁰ Ibid. p. 98.

⁸⁶¹ Rodríguez Jiménez, J.L. *Antisemitism and the Extreme Right in Spain (1962-1997)*. ACTA. No. 15. The Hebrew University of Jerusalem, (1999), p. 4.

⁸⁶² Rodríguez Jiménez, J.L. *Nuevos Fascismos? Extrema Derecha y Neofascismo en Europa y Estados Unidos*. Barcelona: Ediciones Península, (1998), pp. 313-314.

⁸⁶³ Casals, X. *La Tentación Neofascista en España*. Barcelona: Plaza Janes, (1998), p. 132.

⁸⁶⁴ Rodríguez Jiménez, J.L. *La Extrema Derecha Española en el Siglo XX*. Madrid: Alianza Universidad, (1997), p. 398.

⁸⁶⁵ Rodríguez Jiménez, J.L. *Nuevos Fascismos? Extrema Derecha y Neofascismo en Europa y Estados Unidos*. Barcelona: Ediciones Península, (1998), pp. 310-312.

⁸⁶⁶ Rodríguez Jiménez, J.L. *La Extrema Derecha Española en el Siglo XX*. Madrid: Alianza Universidad, (1997), p. 497.

right in Spain. In addition, these groups were also focused on a *world movement*, which the isolationist right in Spain could not relate to.⁸⁶⁷

The growth of CEDADE, *Bases Autonomas* and numerous splinter groups could be seen as countering a focus on Franco. The slower rate of development of the extreme right in Spain due to the Franco dictatorship, coupled with its lack of electoral success, could change as time passes. The threat of the extreme right should not be merely disregarded, especially when one considers that there has been a rise in neo-Nazi and skinhead groups, such as the groups associated with *Bases Autonomas*, witnessed in Spain since the 1990s.⁸⁶⁸ In the 1990s, skinhead groups began to ally themselves with local extreme right organisations throughout the country; resulting in an increase in violent action by the extreme right, including racially motivated attacks.⁸⁶⁹ Between 1995 and 2000 the number of violent skinheads on police files rose from 2,300 to 11,132; with these belonging to an estimated 55 neo-Nazi or skinhead organisations. The total number of violent skinheads, including those not on police files, was estimated to be around 21,000.⁸⁷⁰ One of the areas within Spain with the most skinheads is reported to be Madrid, where in 2004 it was estimated that 600 attacks on members of minority groups took place.⁸⁷¹ Such attacks are of particular concern as the number of immigrants in Spain has been steadily rising. Between 1999 and 2005 the percentage of immigrants rose from 1.9% of the population to 7%.⁸⁷² This rise, coupled with the rise in unemployment that Spain has been experiencing (10% in 2001 to 17% in 2009),⁸⁷³ represent the kind of climate in which the extreme right could flourish.

⁸⁶⁷ Casals, X. *Neonazis en España – De las Audiciones Wagnerianas a los Skinheads (1966-1995)*. Barcelona: Grijalbo, (1995), pp. 16-22.

⁸⁶⁸ Rodríguez Jiménez, J.L. *La Extrema Derecha Española en el Siglo XX*. Madrid: Alianza Universidad, (1997), p. 497.

⁸⁶⁹ Casals, X. *Neonazis en España – De las Audiciones Wagnerianas a los Skinheads (1966-1995)*. Barcelona: Grijalbo, (1995), pp. 269-272.

⁸⁷⁰ The Stephen Roth Institute for the Study of Contemporary Antisemitism and Racism, Tel Aviv University www.tau.ac.il/Anti-Semitism/CR.htm (Accessed 13/04/10).

⁸⁷¹ Ibid.

⁸⁷² National Statistics Institute www.ine.es (Accessed 17/04/10).

⁸⁷³ Ibid.

Extreme Right Speech

Irrespective of the lack of electoral success that extreme right parties have had in Spain; failings have arisen due to internal conflict, lack of continuity and little popular support. In the instances of some very extreme political organisations such as *Bases Autonomas*, the Spanish state, in line with liberal principles, has not stepped in to curtail the activities of the groups. Although extreme political organisations have been banned in Spain, banning has only been possible through registering organisations as terrorist in the context of a post September 11th world. Despite the growth of Basque Homeland and Freedom (Euskadi Ta Askatasuna - ETA), a Basque separatist group, and its attacks on civilians and government property during the 1980s and 1990s, the Spanish Constitution made it very difficult for any restrictions to be placed upon the group. Although a motion was started in 1996 for the group to be banned, a ban was not possible until 2001, when it was registered as a terrorist organisation. Subsequently, *Batasuna*, a political party affiliated with ETA, was also registered as a terrorist organisation and banned in 2003 under *Ley Orgánica 6/2002*. In banning *Batasuna*, the Constitutional Tribunal (STC 48/2003, STC 55/2004) was careful to state that any ideological project is compatible with the Constitution as long as it is pursued through legitimate means; *Batasuna* was regarded as pursuing its agenda through illegitimate means.⁸⁷⁴ The difficulty in banning an organisation that carried out such a large number of attacks on the public serves as an example of the difficulties that there would be in attempting to restrict the activities of extreme right political organisations. Regarding their speech, it would also seem that there is little room within the Spanish Constitution for restrictions to be implemented.

CEDADE and its publishing houses are an example of the lack of restrictions upon racist hate speech. Between 1975 and 1980, CEDADE increased its rate of publication and the racist content of its material,⁸⁷⁵ including amongst its titles works by extreme right authors from across

⁸⁷⁴ Revenga Sánchez, M. *La Libertad de Expresión y sus Límites – Estudios*. Lima: Editorial Jurídica Grijley, (2008), p. 180.

⁸⁷⁵ Casals, X. *Neonazis en España – De las Audiciones Wagnerianas a los Skinheads (1966-1995)*. Barcelona, Grijalbo, (1995), p. 125.

Europe. They began publishing their material with CEDADE due to the fact that “in Spain there were few impediments to the publication of neo-Nazi material”.⁸⁷⁶ In addition, CEDADE also began to sell Nazi music and other Nazi paraphernalia, as well as neo-Nazi material, in order to increase its funding capacity.⁸⁷⁷ Much of the work published by CEDADE consisted of racist hate speech and alleged scientific proof for racial superiority; including discussions about the higher birth rates of non-whites and racial hierarchies based on supposed Intelligence Quotient tests.⁸⁷⁸ CEDADE published its magazine on a monthly basis from 1979 to 1989, alongside a number of foreign language publications aimed at the neo-Nazi market in the rest of Europe. By 1990, though, support began to dwindle and the publication was reduced to a yearly issue by 1992.⁸⁷⁹ In addition to the publications, CEDADE began coordinating meetings by foreign neo-Nazi groups. As such meetings would have been illegal in other European countries such as Germany, they were held in Spain. Amongst these meetings was a mass celebration on the centenary of Hitler’s birth in 1989.⁸⁸⁰ The fostering of foreign extreme right speech in Spain is also demonstrated by the fact that in 1996 the Spanish Parliament refused an extradition order from the German government for Otto Remer, a former SS general. Remer had been sentenced in Germany for promoting hate, violence and racism in 1992, subsequently fleeing to Spain.⁸⁸¹

Despite CEDADE’s dismantling in 1993 after internal conflicts, the legacy of extreme right publishers in Spain has continued. The Spanish Constitution, often regarded as “a great collective victory by liberty”,⁸⁸² plays a considerable role in allowing these activities. Another organisation which

⁸⁷⁶ Rodríguez Jiménez, J.L. *Antisemitism and the Extreme Right in Spain (1962-1997)*. ACTA. No. 15. The Hebrew University of Jerusalem, (1999), p. 11.

⁸⁷⁷ Casals, X. *Neonazis en España – De las Audiciones Wagnerianas a los Skinheads (1966-1995)*. Barcelona: Grijalbo, (1995), p. 126.

⁸⁷⁸ *Ibid.* pp. 125-159.

⁸⁷⁹ Rodríguez Jiménez, J.L. *Antisemitism and the Extreme Right in Spain (1962-1997)*. ACTA. No. 15. The Hebrew University of Jerusalem, (1999), p. 5.

⁸⁸⁰ *Ibid.* p. 19.

⁸⁸¹ The Stephen Roth Institute for the Study of Contemporary Antisemitism and Racism, Tel Aviv University www.tau.ac.il/Anti-Semitism/CR.htm (Accessed 13/04/10).

⁸⁸² Translated from: “la gran conquista colectiva de la libertad”, Pizzaroso Quintero, A. (ed.) *Libert@dexpresion.es 25 Aniversario de la Constitución Española*. Valencia: Diputación de Valencia, (2003).

began to publish racist extreme right material was *Nuevo Socialismo*; its first publication appeared in 1984.⁸⁸³ Similar to CEDADE, *Nuevo Socialismo* attempted to link racism and scientific research in its publications. Despite being a more militant organisation than CEDADE, *Nuevo Socialismo* sought a public political presence, registering as a political party under the name *Partido Popular Alternativo* (PPA) in 1985. No success was achieved, though, and the party dismantled in 1987; although the publications continued.⁸⁸⁴ Other publishing houses which began to publish neo-Nazi material in Spain in the 1980s, including the works of foreign authors, were Ediciones BAUSP, Ediciones Wotan and Ediciones Nuevo Arte Thor, to name but a few.⁸⁸⁵

Besides the racist speech produced by extreme right organisations such as CEDADE, *Bases Autonomas* and *Nuevo Socialism*, such speech has also been uttered by political organisations linked to political parties and the parties themselves. *Alternativa Europea*, legalised as a political association in Barcelona in 1994, through its bi-monthly publication *Tribuna de Europa* promotes an anti-Semitic stance. In 1997 *Alternativa Europea – Liga Social Republicana*, was registered as the organisation's political party.⁸⁸⁶ *Alternativa Europea* joined forces in the year 2000 with two other groups to form the *Movimiento Social Republicano*, whose rhetoric continued along the lines of its predecessors.⁸⁸⁷ *Juntas Española*, an extreme right party that existed between 1983 and 1993, had a strong anti-immigration stance which included racist attacks on African migrants, referring to them as “infection carriers, bringing drug problems into the country and international delinquency”.⁸⁸⁸

⁸⁸³ Casals, X. *Neonazis en España – De las Audiciones Wagnerianas a los Skinheads (1966-1995)*. Barcelona: Grijalbo, (1995), p. 197.

⁸⁸⁴ *Ibid.* pp. 200-204.

⁸⁸⁵ Rodríguez Jiménez, J.L. *Antisemitism and the Extreme Right in Spain (1962-1997)*. ACTA. No. 15. The Hebrew University of Jerusalem, (1999), p. 5.

⁸⁸⁶ Rodríguez Jiménez, J.L. *Antisemitism and the Extreme Right in Spain (1962-1997)*. ACTA. No. 15. The Hebrew University of Jerusalem, (1999), pp. 7-8.

⁸⁸⁷ The Stephen Roth Institute for the Study of Contemporary Antisemitism and Racism, Tel Aviv University www.tau.ac.il/Anti-Semitism/CR.htm (Accessed 13/04/10).

⁸⁸⁸ Rodríguez Jiménez, J.L. *Antisemitism and the Extreme Right in Spain (1962-1997)*. ACTA. No. 15. The Hebrew University of Jerusalem, (1999), p. 15.

Irrespective of the lack of electoral success, the absence of an all-encompassing extreme right party in Spain, since the dissolution of *Fuerza Nueva*, has in itself had a significant impact. The importance for the extreme right of publishing houses and other organisations distributing extreme right material has increased due to this absence. It has even been argued that “this has given neo-Nazis a greater visibility than if there were a single neo-Francoist or neo-Falangist party”.⁸⁸⁹

The prominent rhetoric amongst the Spanish extreme right seems to be one of anti-immigration, with racist hate speech appearing as a manifestation of this rhetoric. The impact of such speech, irrespective of the lack of political success by Spanish extreme right parties, should not be negated. A survey carried out in 2003 by the Centro de Investigaciones Sociologicas suggested that 48% of Spanish citizens thought that there were too many immigrants in Spain. In 1994 this figure was 29%; with 17.6% of people considering immigration the principal social problem, although this latter figure has remained at similar levels since. A third of those polled in 2003 also believe that immigrants took jobs away from Spanish citizens, with 62% believing that salaries had decreased as a result of immigration.⁸⁹⁰ This is particularly concerning when one considers that at that time immigrants only constituted 4.5% of the Spanish population.⁸⁹¹ The growing trend of a rise in both immigration and unemployment, as mentioned in the previous section, could result in such views and the attacks against immigrants becoming a growing problem.

Racist Hate Speech and the Law

Having in the previous sections considered the levels and forms of extreme right racist hate speech in Spain, attempts to curtail this speech through legislation will now be assessed. This assessment will test the alignment between the legislation in question and liberalism.

Irrespective of the freedom of speech granted to the extreme right, including racist hate speech, there have been instances where attempts

⁸⁸⁹ Ibid. p. 11.

⁸⁹⁰ www.cis.es/cis/opencms/ES/index.html (Accessed 14/04/10).

⁸⁹¹ National Statistics Institute www.ine.es (Accessed 15/04/10).

have been made to curtail such speech. An act that numerous extreme right supporters who followed Franco had partaken in since his death was the celebration of the anniversary of his death. A particularly symbolic gesture were the demonstrations held at the cemetery where Franco was buried, the *Valle de los Caídos* (Valley of the Fallen), a cemetery built during Franco's dictatorship for those who had fallen during the Civil War.⁸⁹² These demonstrations were outlawed in December 2007 when the law 52/2007 – *Ley de Memoria Histórica* (Law of Historical Memory) was passed. This law aimed to “recognise and broaden the rights and establish measures in favour of those who suffered persecution or violence during the Civil War and dictatorship”,⁸⁹³ including facilitating the issuing of Spanish citizenship for those who were forced into exile by the Civil War and their families; and compensation for victims and their families. This law also covered, through Articles 15 and 16, the possibility and need to curtail offence caused by symbols and demonstrations in favour of the Civil War and the dictatorship. Article 15 deals with symbols and public monuments. The Article states that local administrations will remove symbols and monuments that commemorate the Civil War or the dictatorship; unless they are privately owned or in the interest of artistic, including religious art, or architectural features.⁸⁹⁴ Article 16 deals with demonstrations in the Valley of the Fallen. The Article states that no political demonstrations or demonstrations in favour of the Civil War or the dictatorship will be allowed in the cemetery.⁸⁹⁵

The Law of Historical Memory could be regarded as a restriction on extreme right speech; those whose speech is restricted by the law being supporters of Franco and his regime. It is important to note that what is considered as speech in this thesis, as discussed in Chapter 1, includes symbols and monuments, as well as demonstrations. This law would seem to parallel the radical feminist and republic alignment that is attempted in this

⁸⁹² Gilmour, J. *Life Under and After Franco: The Contrasting Fortunes in Spain of the Right and the Extreme Right since the Civil War. Occasional Paper Series.* University of Bristol. No. 31, (October, 1999), p. 9.

⁸⁹³ Se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura.

http://leymemoria.mjusticia.es/paginas/es/ley_memoria.html (Accessed 14/04/10).

⁸⁹⁴ http://leymemoria.mjusticia.es/paginas/es/ley_memoria.html (Accessed 14/04/10).

⁸⁹⁵ *Ibid.*

project. The law seems to recognise the possibility of harm caused by speech; as well as the power granted to particular forms of speech, such as extreme right hate speech, due to the history of violence that has preceded the formulation of the speech. However, irrespective of the fact that the law seems to be following this rationale, it is important to note that the rationale behind these restrictions in fact remains in line with liberal ideas on freedom of speech. The law is particularly clear in stating that the restrictions that are to be implemented are being put in place due to any offence that may be caused by the speech.⁸⁹⁶ In liberal theory, offence is as much as speech is accredited with being able to inflict. It is also in line with a liberal rationale for privately owned symbols of the dictatorship and Civil War to be excluded from this law, the focus being on public utterances of speech, the realm under which liberal theory considers the possibility of restrictions. To emphasise this concern with public utterances, the law makes it clear that it is not its purpose “to create a collective history”;⁸⁹⁷ paralleling a liberal focus on individuality.

Another law restricting speech that was passed in Spain, which also affected the extreme right and their utterances of racist hate speech, was *Ley Orgánica 10/1995* of the Penal Code, passed on 23 November 1995. In accordance with Article 607.2 of this law:

The diffusion by any means of ideas or doctrines that deny or justify the crimes stated in the previous article (genocide - Aim to destroy totally or partially a national, ethnic, racial or religious group), or intend the reinstating of regimes or institutions that apply the same practices, will be punished by a prison sentence of two years.⁸⁹⁸

Under this law, in November 1998 Pedro Varela, former president of CEDADE, was sentenced to two years in prison for Holocaust denial and three years in prison for incitement to racial and religious hatred. Of particular concern was material that suggested the Jews should be

⁸⁹⁶ Citizens have the right for it to be so, for the public symbols to be encounters and not an affront, offence or insult (los ciudadanos tienen derecho a que así sea, a que los símbolos públicos sean ocasión de encuentro y no de enfrentamiento, ofensa o agravio).

http://leymemoria.mjusticia.es/paginas/es/ley_memoria.html (Accessed 14/04/10).

⁸⁹⁷ http://leymemoria.mjusticia.es/paginas/es/ley_memoria.html (Accessed 14/04/10).

⁸⁹⁸ La difusión por cualquier medio de ideas o doctrinas que *nieguen o* justifiquen los delitos tipificados en el apartado anterior de este artículo, o pretendan la rehabilitación de regímenes o instituciones que amparen prácticas generadoras de los mismos, se castigará con la pena de prisión de uno a dos años. http://noticias.juridicas.com/base_datos/Penal/lo10-1995.html (Accessed 16/04/10).

exterminated like rats.⁸⁹⁹ In May 1999, though, the Appeals Court forwarded the case to the Constitutional Court on the grounds that article 607.2 of the *Ley Orgánica 10/1995* was in conflict with Article 20 of the Constitution.⁹⁰⁰ The Constitutional Tribunal dealt with the issue of the unconstitutionality of Article 607.2 of the *Ley Orgánica 10/1995* due to a clash with Article 20 of the Constitution in November 2007, under the sentence STC 235/2007.⁹⁰¹ The ruling of the Constitutional Tribunal was that Article 607.2 did, indeed, clash with Article 20 of the Constitution. The element of Article 607.2 which the Court found to be in conflict with the Constitution was the inclusion of genocide denial alongside justification. Although the justification of genocide was not deemed to be unconstitutional, denial had to be omitted from the Article. The tribunal stated that this ruling had been reached due to the importance of freedom of speech; that irrespective of how unpleasant genocide, and in particular Holocaust, denial might be, such ideas must be permitted in the interest of pluralism, toleration, and the “spirit of openness without which a democratic society cannot exist”.⁹⁰² Referring to a previous ruling by the Tribunal, STC 176/195, they recalled that the Constitution is there to protect even those who deny it; rather than merely those whose ideas are in line with those of the state. As a result of this change in the law in 2008 the sentence of Pedro Varela was reduced from five years to seven months in prison.⁹⁰³

The rationale under which the law was deemed to be unconstitutional, the interests of pluralism, toleration, and the spirit of openness, are in line

⁸⁹⁹ Under Article 515.1 of the law 10/1995 Those who provoke discrimination, hatred or violence against a group or association, due to racist, antisemitic or other references to ideology, religion or beliefs, family situation, membership of an ethnic group or race, national origin, sex, sexual orientation, illness or disability, will be punished with a prison sentence of three years. (Los que provocaren a la discriminación, al odio o a la violencia contra grupos o asociaciones, por motivos racistas, antisemitas u otros referentes a la ideología, religión o creencias, situación familiar, la pertenencia de sus miembros a una etnia o raza, su origen nacional, su sexo, orientación sexual, enfermedad o minusvalía, serán castigados con la pena de prisión de uno a tres años y multa de seis a doce meses.) http://noticias.juridicas.com/base_datos/Penal/lo10-1995.html (Accessed 16/04/10).

⁹⁰⁰ The Stephen Roth Institute for the Study of Contemporary Antisemitism and Racism, Tel Aviv University www.tau.ac.il/Anti-Semitism/CR.htm (Accessed 13/04/10).

⁹⁰¹ <http://www.tribunalconstitucional.es/en/jurisprudencia/Pages/Sentencia.aspx?cod=9396> (Accessed 16/04/10).

⁹⁰² Ibid.

⁹⁰³ The Stephen Roth Institute for the Study of Contemporary Antisemitism and Racism, Tel Aviv University www.tau.ac.il/Anti-Semitism/CR.htm (Accessed 13/04/10).

with liberal theory. The inclusion of genocide denial in the Penal Code could have been seen as contradicting the proposition that a state with a liberal constitution would be less likely to restrict extreme right racist hate speech than one with a republican constitution. However, the fact that this law was overturned in Spain perhaps goes further towards aligning its constitution with liberalism than would the simple omission of such a law. Although racist hate speech is not directly referenced in the Spanish Penal Code Article 510 of *Ley Orgánica 10/1995* states that to provoke discrimination, hatred or violence against a group due to their race or religion will be punishable by law.⁹⁰⁴ In the few instances that issues of racist hate speech have been dealt with by the Spanish Constitutional Tribunal, they have tended to base restrictions on the right to honour;⁹⁰⁵ the rationale for restrictions has been linked to issues of respect.⁹⁰⁶ Such rationale may again be interpreted as further aligned with liberalism than republicanism; as will be seen in the case of Finland, there is a much greater concern there for issues of equality when considering restrictions.

8.2 The Extreme Right in Finland

Finland has been considered an exception in the resurgence of extreme right movements experienced in many European countries. Despite this lack of a flourishing extreme right, though, the Finnish case should not be overlooked; especially considering the history of the extreme right in Finland. Moreover, there have been some faint signs of resurgence amongst the Finnish authoritarian right in recent years.⁹⁰⁷ What I aim to assess in this section is whether the way in which the Finnish state has dealt with the extreme right, whether restrictions that have been put in place to limit the extreme right, parallel a republican rather than a liberal rationale. An assessment of these

⁹⁰⁴ noticias.juridicas.com/base_datos/Penal/lo-10-1995.12t21.html (Accessed 27/06/10).

⁹⁰⁵ Revenga Sánchez, M. *La Libertad de Expresión y sus Límites – Estudios*. Lima: Editorial Jurídica Grijley, (2008), p. 189.

⁹⁰⁶ STC 176/1995 is an example of this. In this case a man attempted to appeal against a court action brought against him by Jewish organisations for religious defamation as a result of him publishing an album called *Hitler –SS*. <http://constitucion.rediris.es/juris/1995/STC176.html> (Accessed 27/06/10).

⁹⁰⁷ Pekonen, K. (ed.), *The New Radical Right in Finland*. Kopijyva: The Finnish Political Science Association, (1999), p. 9. It should be noted that Pekonen is the eminent writer on the extreme right in Finland, his book being the only English publication on the contemporary extreme right in Finland.

restrictions is of particular interest due to the present socio-political conditions in Finland. Rising unemployment, economic hardship, growing immigration and political disenfranchisement are all conditions which, historically, have led to an increase in extreme right support. During these difficult times, Finland's backwards looking extreme right could be replaced by the new right seen in other European countries.

After Finland was declared independent from Russia in 1917, and the 1918 Civil War, considerable extreme right activity began; with influences from Fascist Italy beginning to infiltrate the Finnish right wing in the early 1920s.⁹⁰⁸ The extreme right organisations of the early 1920s were predominantly small; by 1929, though, signs of a mass extreme right movement began to emerge. The *Lapua Movement*, with a strong nationalist agenda and an anti-Russian and anti-Communist stance, became increasingly influential across Finland; spreading violence and succeeding in having all communist activities banned through the *Communist Laws* of 1930.⁹⁰⁹ This success was followed by the election of the *Lapua's* stated choice of presidential candidate, Svinhufvud.⁹¹⁰ By 1932, though, Svinhufvud asserted his power over the *Lapua's* and undermined the group to such an extent that they were no longer able to obtain popular support. In response, the *Lapua* regrouped and formed the Patriotic People's Movement (*Isanmaallinen Kansanliike* - IKL), the explicit aim of which was to continue the work of the *Lapua*.⁹¹¹ The IKL, though, "never managed to become one of the major parties in Finland. Compared to many other European countries, particularly the rest of Scandinavia, the Finnish fascist party can nevertheless be characterized as sizable".⁹¹²

After the end of World War II, the situation for the extreme right in Finland was to drastically change. The fight against Fascism in Germany and Italy extended to Finland. Finland's geographical positioning meant that it

⁹⁰⁸ Karvonen, L. *From White to Blue and Black – Finnish Fascism in the Inter-War Era*. Helsinki: The Finnish Society of Sciences and Letters, (1988), pp. 9-18.

⁹⁰⁹ Eatwell, R. & Mudde, C. (eds.) *Western Democracies and the New Extreme Right Challenge*. London: Routledge, (2004), p. 93.

⁹¹⁰ Karvonen, L. *From White to Blue and Black – Finnish Fascism in the Inter-War Era*. Helsinki: The Finnish Society of Sciences and Letters, (1988), p. 23.

⁹¹¹ *Ibid.* pp. 25-26.

⁹¹² *Ibid.* p. 28.

was a bridge between Eastern and Western Europe, moreover, its historical ties with Russia, by this time the Soviet Union, added to a perceived need for the extreme right there to be eliminated. Once the extreme right had collapsed in Finland at the end of World War II, the country's focus turned from nationalism to foreign relations. Finns considered it extremely important to maintain good relations with both East and West during the Cold War years, again due to their geographical position. Their foreign policy focus meant that extreme right support was alienated, as the extreme right was associated with being against the Soviet Union.⁹¹³ In addition, there was also growing support for communism in Finland;⁹¹⁴ further squeezing out the extreme right's support base. Irrespective of the fact that the grounds for popular support of the extreme right had diminished, there was another reason as to why extreme right parties in Finland did not grow in the same way as in other European countries during the 1980s. Extreme right parties in Finland were banned.

In 1944 extreme right parties were banned in Finland through provisions of the *Finnish-Soviet Armistice*. This agreement included the banning of the IKL.⁹¹⁵ In addition, "fascist books were removed from the libraries, schoolbooks were censored, fascist newspapers were suppressed and a system of informing was encouraged".⁹¹⁶ This ban remained in place until 1991. The ban did not signify the complete elimination of the extreme right; as parties changed their platforms or moved underground. The *Finnish Rural Party* (SMP), for example, began to gain support, achieving some electoral success in the late 1960s, 1970s and 1980s. In 1970, their most successful year, they obtained 10.5% of the vote in the presidential elections and 18 of their members were elected to parliament. Once the ban on extreme right parties was lifted in 1991, the SMP began to change its election platform. During the 1991 presidential elections they began to make

⁹¹³ Pekonen, K. (ed.) *The New Radical Right in Finland*. Kopijyva: The Finnish Political Science Association, (1999), p. 34.

⁹¹⁴ Ibid. p. 72.

⁹¹⁵ Karvonen, L. *From White to Blue and Black – Finnish Fascism in the Inter-War Era*. Helsinki: The Finnish Society of Sciences and Letters, (1988), p. 29.

⁹¹⁶ Pekonen, K. (ed.) *The New Radical Right in Finland*. Kopijyva: The Finnish Political Science Association, (1999), p. 64.

xenophobic arguments. This change in stance, though, did not prove particularly fruitful for the SMP. By the 1995 presidential elections their support had fallen to 1.5% of the vote and they had just one member of parliament remaining.⁹¹⁷ Although the SMP has not been labelled an extreme right party, its “characteristics at times put it within this field”; in particular its focus on xenophobia”.⁹¹⁸

The SMP also signifies another trend in Finnish politics. Populist movements, an exemplar of which would be the SMP, have had a long tradition in Finland. Since the 1930s they have been closely related to extreme right movements such as the *Lapua* and the IKL. Once extreme right parties were banned, those who had supported the extreme right turned to oppositional movements with populist tactics such as the SMP.⁹¹⁹

Since the lifting of the ban on extreme right parties a number of factors which are often regarded as feeding extreme right support have been noted. Such factors include the number of foreigners in Finland, a country which is considerably ethnically homogenous, doubling over the last twenty years;⁹²⁰ rising unemployment and political as well as economic discontent;⁹²¹ and elements within the Finnish electoral system which benefit small parties.⁹²² In addition, since the collapse of the Soviet Union in 1991 part of the rationale for not supporting the extreme right, to not appear anti-Soviet, was removed from the equation.⁹²³

Despite these seemingly favourable circumstances for the extreme right in Finland since 1991, there are only an estimated 40 extreme right organisations there;⁹²⁴ a significantly smaller number than that of other European countries. The most notorious of these organisations have been

⁹¹⁷ Ibid. p. 60.

⁹¹⁸ Ibid. p. 36.

⁹¹⁹ See Appendix 1.

⁹²⁰ Pekonen, K. (ed.) *The New Radical Right in Finland*. Kopijyva: The Finnish Political Science Association, (1999), p. 62.

⁹²¹ Ibid. p. 18.

⁹²² Ibid. p. 49.

⁹²³ The proportional electorate system of Finland can allow small parties and individuals to obtain public attention. In addition, the fact that voters choose a candidate from a party list makes elections more personalised; again aiding small groups and individuals. Pekonen, K. (ed.) *The New Radical Right in Finland*. Kopijyva: The Finnish Political Science Association, (1999), p. 49.

⁹²⁴ Pekonen, K. (ed.) *The New Radical Right in Finland*. Kopijyva: The Finnish Political Science Association, (1999), p. 38.

the Patriotic National Alliance (*Isanmaallinen Kansanliitto – IKL*) and the *Patriotic Right*. The IKL, even in name, references the extreme right parties of the 1930s; argues in favour of Finland's borders being changed to pre-1939 borders, after which Finland lost land to the Soviet Union; criticise immigration; and believe Finns should be favoured over other nationalities with regards to, for example, jobs.⁹²⁵ The *Patriotic Right*, meanwhile, is a neo-Nazi organisation comprised mostly of skinheads.⁹²⁶ Despite the existence of these 40 organisations, only one, The Finnish People's Blue-Whites (*Suomen Kansan Sinivalkoiset – SKS*), has achieved the 5,000 supporting signatures necessary to become an official party. However, in accordance with Finnish law, if during two consecutive electoral terms a party does not have a Member of Parliament elected, then they cannot continue on the official party list; which was the case with the SKS. The SKS, founded in 2002, was removed from the party list in 2007 as a consequence of not having any Members of Parliament elected. The SKS, though, did succeed in having city council members elected in the city of Turku.⁹²⁷

The lack of electoral success is partly attributed to the backwards looking elements of the extreme right in Finland.⁹²⁸ The focus by the extreme right on its successes during the 1930s has meant that it has missed some opportunities to focus on current political issues affecting Finland. In addition, it means that it lacks the element of pan-European alliances of the new right.⁹²⁹ The social classes that the old extreme right in Finland appealed to are very different from those targeted by the new right.⁹³⁰ The changing circumstances in Finland, and the growth of economic hardship, could, however, increase support for the new right. Although there do seem to be some factors which appear to make Finland an exception as far as the rise of a new far right is concerned; for example, low voting turn out and rhetoric are

⁹²⁵ Ignazi, P. *Extreme Right Parties in Western Europe*. Oxford: Oxford University Press, (2003), p. 160.

⁹²⁶ Pekonen, K. (ed.) *The New Radical Right in Finland*. Kopijyva: The Finnish Political Science Association, (1999), p. 117.

⁹²⁷ See Appendix 1.

⁹²⁸ Pekonen, K. (ed.) *The New Radical Right in Finland*. Kopijyva: The Finnish Political Science Association, (1999), p. 23.

⁹²⁹ *Ibid.* pp. 22-23.

⁹³⁰ *Ibid.* p. 63.

almost the only signs of citizen dissatisfaction; the levels of discontent, or mode of demonstrating discontent, do not seem to have reached a point that could lead to mass extreme right support.⁹³¹

Irrespective of this limited support for the extreme right and its backwards looking elements, it is important to note that there has been a new right style group that has been gathering support in Finland, the *True Finns Party (Perussuomalaiset)*. The *True Finns* was founded in 1995; it was spawned from the remains of the bankrupt SMP.⁹³² The *True Finns*' political platform is based on a stance that is anti-European Union, anti-immigration and anti-asylum,⁹³³ with them describing themselves a "nationally minded party".⁹³⁴ The *True Finns* has been labelled as a racist party, with candidates standing for the party at times openly expressing racist views. The view of the *True Finns* as racist was exacerbated by the fact that in 2009 they were the only party in the Finnish parliament that refuse to sign a statement against racism and a commitment to fight racism.⁹³⁵ It is important to note, though, that irrespective, the leader of the *True Finns*, Timo Soini, denies that his party is a racist party; although some members of his party have been charged for racist hate crimes.⁹³⁶ Moreover, some of the racist groups within the *True Finns* have become disillusioned with what they consider the mild stance the party to be taking. A splinter party *Change 2011* was formed as a consequence of this discontent, *Change 2011* was officially registered as a party in October 2010.⁹³⁷

Support for the *True Finns* has been increasing ever since the party was founded. In the 2000 presidential election its candidate gained only 1% of the vote; at the 2006 elections this share had risen to 3.4%. At the parliamentary elections in 1999 the *True Finns* obtained 1% of the vote and

⁹³¹ Ibid. p. 21.

⁹³² Annesley, C. (ed.) *A Political and Economic Dictionary of Western Europe*. London: Routledge, (2005), p. 308.

⁹³³ yle.fi/uutiset/news/2010/02/true_finns_call_for_migration_ministers_resignation_1425258.html (Accessed 16/04/10).

⁹³⁴ web.eduskunta.fi/Resource.phx/parliament/parliamentarygroups/truefinnspartyparliamentarygroup.htx (Accessed 02/06/10).

⁹³⁵ svenskfinland.wordpress.com/2009/02/16/true-finns-party-proud-to-discriminate/ (Accessed 02/06/10).

⁹³⁶ These charges will be discussed in the next section of this chapter.

⁹³⁷ See Appendix 1.

had one Member of Parliament elected; by 2003 this had risen to 1.6% of the vote and three Members of Parliament. At the last parliamentary elections in 2007 they polled 4.1% of the vote and five of their candidates were elected as Members of Parliament. In 2009 the *True Finns* also had their first Member of the European Parliament elected.⁹³⁸ In a survey published in November 2010, it was estimated that support for the *True Finns* had risen to 14.3%. Such figures suggest that “big support is not possible for any openly racist party but it may, on the contrary, tell how the leader Timo Soini has succeeded in dissipating the questions of the racism of the party”.⁹³⁹

In addition, extreme right candidates have managed to have some impact on the Finnish political system. Although, as mentioned above, only one extreme right organisation has collected the necessary number of signatures to become an official political party, members of extreme right organisations have run as candidates for other parties. The most successful of these has been the *In Defence of Turku Alliance*, a party that includes amongst its members individuals involved in the skinhead movement. The *Alliance* openly speaks out against asylum seekers, in particular those from Somalia,⁹⁴⁰ and the threat of Islamification.⁹⁴¹ Propaganda against asylum seekers has, in fact, been the biggest issue that the extreme right has brought to the Finnish political arena:⁹⁴² in some ways surprising given that Finland has one of the lowest percentages of foreign residents of any

⁹³⁸ See: yle.fi/uutiset/news/2008/10/stunning_rise_by_true_finns_party_357593.html (Accessed 16/05/10); www.irr.org.uk/cgi-bin/news/open.pl?id=7492 (Accessed 17/05/10); www.stat.fi/til/euvaa_2009_2009-06-12_tie_001_e.html (Accessed 17/05/10); Eatwell, R & Mudde, C. (eds.) *Western Democracies and the New Extreme Right Challenge*. London: Routledge, (2004) p. 150.

⁹³⁹ See Appendix 1.

⁹⁴⁰ Somalis are the largest group of asylum seekers in Finland. http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-10-003/EN/KS-QA-10-003-EN.PDF (Accessed 16/05/10).

⁹⁴¹ Pekonen, K. (ed.) *The New Radical Right in Finland*. Kопijyva: The Finnish Political Science Association, (1999), pp. 50-51.

⁹⁴² *Ibid.* p. 52.

European country⁹⁴³ and that asylum seekers are quite a new phenomenon.⁹⁴⁴

Besides this limited, although concerning, electoral success there have been other extreme right activities in Finland that should be noted, including some during the years of the ban on extreme right parties. Since the 1980s skinhead groups have been emerging in Finland. The police estimate their numbers to be approximately 400, whilst the skinheads claim that there are, in fact, around 1,000 of them.⁹⁴⁵ These numbers, as was the case with the number of extreme right organisations, are considerably smaller than those found in other European countries where the extreme right is considered a growing problem. Moreover, despite their rise in the 1980s, skinhead groups in Finland have been in decline since the 1990s.⁹⁴⁶ Irrespective, these groups distribute newspapers, music and magazines; display Nazi symbols; express a very open anti-Russian stance;⁹⁴⁷ and are openly racist.⁹⁴⁸ It is important to note, though, that violence remains limited.⁹⁴⁹

⁹⁴³ Only 2.5% of the Finnish population consists of foreign citizens in 2008 (including citizens of the other EU member states). This means Finland has the 7th lowest percentage of foreign citizens from the EU27 member states. http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-16122009-BP/EN/3-16122009-BP-EN.PDF (Accessed 02/06/10).

⁹⁴⁴ http://www.expatica.com/de/employment/employment_information/True-Finns-party-sparks-immigration-debate-in-Finland-_14116.html (Accessed 13/04/10).

⁹⁴⁵ Pekonen, K. (ed.) *The New Radical Right in Finland*. Kopijyva: The Finnish Political Science Association, (1999), p. 48.

⁹⁴⁶ See Appendix 1.

⁹⁴⁷ Russians are regarded as one of the immigrant groups that face the most racism in Finland. With this often been related to the history of Russian occupation and the aftermath of the Second World War. <https://www.irr.org.uk/cgi-bin/news/open.pl?id=7493> (Accessed 16/05/10).

⁹⁴⁸ Pekonen K. (ed.) *The New Radical Right in Finland*. Kopijyva: The Finnish Political Science Association, (1999), pp. 40-47.

⁹⁴⁹ In accordance with European Union statistics in 2001 448 racist crimes against minorities or foreigners took place in Finland, in 2002 the figure was 367, by 2005, though, this number had risen to 669. Although the increase is clear, when compared to Finland's neighbour Sweden the numbers are considerably smaller. The respective figures in Sweden were 2001: 2670, 2002: 2260, 2005: 2383. Sweden is regarded as a country with a similar culture to Finland, there even being a Swedish speaking minority in Finland, and although there is a disparity to be expected due to the Finnish population being 5.3 million and the Swedish being 9.2 millions, the difference in the number of attacks is considerably greater than the percentage of population difference. Although racist crimes remain limited in Finland, it is important to note that they have been rising. (date from fra.europa.eu – Accessed 17/06/10).

Extreme Right Speech

Besides the ban on extreme right parties that was in place in Finland between 1944 and 1991, there are also restrictions upon extreme right racist hate speech there. As previously mentioned in Chapters 6 and 7, the possibility for restrictions upon speech in Finland is greater than in Spain. The rationale and conception of rights that is to be found in the Finnish Constitution means that there is the possibility of basic rights being limited irrespective of them being laid out in the Constitution; these limits are not considered a breach upon the individual and do not require the Constitution to be changed.

Hate speech is legislated in Finland as a hate crime, with hate crimes falling under the category of discrimination. According to the Finnish Non-Discrimination Act, “no-one may be discriminated against on the basis of gender, age, ethnic or national origin, nationality, language, religion, opinion, health, disability, sexual orientation or other personal characteristics”.⁹⁵⁰ Within this Act, ethnic discrimination is defined as “unequal treatment of people based on the fact that they belong to a certain ethnic or national group...In addition to unequal treatment, discrimination is the creation of an intimidating, hostile, humiliating or offensive environment, and the instruction or order to discriminate”.⁹⁵¹

A hate crime is, in turn, defined by the Ministry of Justice as a crime “committed against a person because the victim belongs to a group of particular ethnicity, religious persuasion or sexual orientation. The crime may also be motivated by the nationality, age, gender, disability or political views of the victim”.⁹⁵² Hate crimes are considered a serious offence in Finland, the effects of such crimes are recognised against both individual victims and the communities they belong to; with social marginalisation and psychological damage being amongst the harms recognised.⁹⁵³ Due to these additional recognised harms to the direct harms caused by whatever crime may have

⁹⁵⁰ <http://www.intermin.fi/intermin/vvt/home.nsf/pages/C9EC4AE764923A64C22573A200327AB5?opendocument> (Accessed 13/04/10).

⁹⁵¹ Ibid.

⁹⁵² <http://www.om.fi/en/1215524015692> (Accessed 13/04/10).

⁹⁵³ Ibid.

been committed, a crime that is motivated by discrimination constitutes grounds for stronger sentencing than it would otherwise.⁹⁵⁴

Hate speech is a sub-category of hate crime. Hate speech is defined as a “verbal attack against a given section of the population or a minority”.⁹⁵⁵ Expressions of hate speech are legislated against in Finland not only when uttered by individuals but also when uttered as part of political rhetoric or media reporting. The latter is considered as particularly harmful because “negative expressions, when uttered by a person in the public eye or printed in the public media, lend legitimacy to attitudes of racism or hostility towards minorities”.⁹⁵⁶ The rationale behind limiting freedom of speech in this way in Finland is based on the idea that despite being a basic right, there are limits upon this right and there is a duty for it to be exercised responsibly.⁹⁵⁷ With regard to distributing racist material, the rationale for restricting freedom that is provided is that such material is harmful “because it is offensive to the people that are the target of the message, reinforces prejudices and, at worst, spreads hostility”.⁹⁵⁸ It is important to note that the Finnish law on such matters is so extensive that it even goes as far as covering material that is posted on the Internet, whereby the publication of hate speech material is punishable by law.⁹⁵⁹

Besides expressions of racism, or racist hate speech, being legislated against, the Finnish legal system also has provisions in place for restrictions upon ethnic agitation (Criminal law, chapter 11, 10) and defamation (Criminal law, chapter 24, 9). Ethnic agitation covers public communications that threaten, insult or defame a national, racial, ethnic or religious group.⁹⁶⁰ An example of ethnic agitation is “strongly misleading and generalising statements concerning an ethnic group...these include statements according

⁹⁵⁴ Ibid.

⁹⁵⁵ Ibid.

⁹⁵⁶ Ibid.

⁹⁵⁷ <http://www.intermin.fi/intermin/vvt/home.nsf/pages/02D68EB7EF560127C22573A200335C90?op=pendocument> (Accessed 17/05/10).

⁹⁵⁸ Ibid.

⁹⁵⁹ <http://www.intermin.fi/intermin/vvt/home.nsf/pages/6E707471AA503F0BC22573A2003371BB?op=pendocument> (Accessed 17/05/10).

⁹⁶⁰ See Appendix 2.

to which a certain ethnic group is or has been guilty of crimes".⁹⁶¹ Defamation, meanwhile, is defined as taking place when someone "brings forth untruthful information or insinuation of another person in such a way that it causes harm or suffering to that person, or leads to his/hers contempt".⁹⁶² Defamation "is considered to occur when someone is the object of untruthful information or insinuations that can cause damage, suffering or humiliation to that person, or otherwise demeaning".⁹⁶³ With regard to racist defamation, it is important to note that in Finnish legal practice the use of the words *neekeri* (nigger) and *ryssä* (a word used to refer to Russians) are considered to "fulfil the essential elements of a defamation offence".⁹⁶⁴ An example of the defamation law in action is a Tampere Municipal Court decision in November 1996; when a woman was convicted of defamation and fined after she had called a foreign-born man, unknown to her, a "Muslim pig".⁹⁶⁵

As previously stated, Finland's strict hate speech legislation also covers political rhetoric; therefore, the hate speech laws are applicable to extreme right political organisations' racist hate speech. The hate speech legislation has affected extreme right activists and politicians, and politicians of parties which may not necessarily be labelled as extreme right but who hold extreme right views. The most notorious extreme right political activist to have been sentenced under hate speech legislation is Seppo Lehto. Lehto, who created a number of Internet blogs containing racist material, was sentenced in May 2008 to two years and four months imprisonment for ethnic agitation. From the SKS, Olavi Mäenpää, a Turku City Council member, was sentenced in March 2009 to 50 days imprisonment for ethnic agitation. A Helsinki City Council member representing the *True Finns* has also been prosecuted under hate speech legislation. Jussi Halla-aho was sentenced in September 2009 for writings against Muslims and Islam. Halla-

⁹⁶¹<http://www.intermin.fi/intermin/vvt/home.nsf/pages/6E707471AA503F0BC22573A2003371BB?opendocument> (Accessed 17/05/10).

⁹⁶² See Appendix 2.

⁹⁶³<http://www.intermin.fi/intermin/vvt/home.nsf/pages/5B15718DCD5EF59EC22573A200337E20?opendocument> (Accessed 17/05/10).

⁹⁶⁴ Ibid.

⁹⁶⁵ See Appendix 2.

aho published in his website that "Prophet Muhammad was a paedophile, Islam sanctifies paedophilia, and therefore it is a paedophile religion. Paedophilia is Allah's will". He was sentenced to 30 days imprisonment.⁹⁶⁶ Halla-aho, though, had charges of defamation dropped, notwithstanding the court noted that "the statement 'mugging of by-passers and feeding off tax revenue are Somalis' national, if not genetic, characteristic' was published on the man's website. The court found this statement, independent of the context, as a typical so called hate speech".⁹⁶⁷

Besides the restrictions upon the hate speech of extreme right political figures, extreme right hate speech has been curtailed in Finland in other senses. Extreme right music networks, for example, have had their materials confiscated and those involved have been arrested under hate speech laws.⁹⁶⁸ In addition, the Finnish Act of Audiovisual Programmes also means that the Finnish Board of Film Classification has a duty to prevent the distribution of audiovisual material, including films and video games, which are in violation of the Penal Code, including racist material.⁹⁶⁹

The restrictions found within Finnish law relating to hate speech and racist hate speech seem alienable with the proposition that a republican constitution is more likely to permit restrictions upon these forms of speech than a liberal constitution. The issues considered in Finnish law relating to these restrictions go beyond harm and offence, the principal liberal concerns when considering hate speech. In Finland, the core issue seems to be a concern with equality. There is an acceptance that racist hate speech may encourage an atmosphere whereby those against whom it is targeted may not be regarded as equals. The placing of hate speech legislation within the Non-Discrimination Act can be interpreted as showing the concern with equality; especially considering that discrimination is defined within this Act as unequal treatment.

⁹⁶⁶ Ibid.

⁹⁶⁷ Ibid.

⁹⁶⁸ <http://www.hs.fi/english/article/Police+raid+extreme+rightwing+music+dealerships+in+Helsinki+and+Kouvola/1135239016213> (Accessed 17/05/10).

⁹⁶⁹ http://www.vet.fi/english/elokuvat_ikarajaluokitus.php (Accessed 16/05/10).

Besides this concern with equality and the conception of rights within the Finnish Constitution which facilitates restrictions, the acceptance of hate crimes as harming individuals as part of a group can also be interpreted as further aligned with republicanism than liberalism; liberalism having a more individualistic focus.

8.3 Conclusion

It would seem from this reading of the legislation regarding racist hate speech in Spain and Finland that the proposition that a republican constitution is more likely to restrict extreme right racist hate speech holds. Meanwhile, the same can be said of the proposition regarding a liberal constitution: namely, that it will be less inclined to allow restrictions. In Finland, it is clear that the extreme right, racist hate speech and pornography can both be restricted. The case in Spain, however, is vastly different, as is shown by the decisions of the Constitutional Tribunal there.

As previously mentioned, there are many reasons and constitutional features that may lead to extreme right racist hate speech and pornography being restricted, or not. As explored in Chapters 2 and 3, there are liberal and republican views as to why these forms of speech may be unacceptable. However, a liberal view tends to be more minimal, focusing on direct harm and discrimination. By contrast, republicanism, with its focus on domination, regards these forms of speech as also diminishing an individual's equal status; thus, legitimising a more proactive legislative view. It is not just that from a republican perspective harm can be seen indirectly, but diminished status is seen as a specific harm. People in a society where discrimination occurs are not being viewed as equals. This view is a democratic view, as opposed to being focused on rights and justice. Therefore, despite the numerous other factors that may have influenced particular legislation, from a republican perspective restrictions can be seen as more likely; a constitution where this democratic element is taken seriously is more inclined to include restrictions upon these forms of speech.

From the perspective of this project, the Finnish case is particularly interesting due to the ban on extreme right activities. After the lifting of the

ban, the extreme right has not been able to take a hold on the democratic system despite its attempts to do so through, amongst other things, racist propaganda.⁹⁷⁰ The ban threw “its shadow over all radical right-wing and national populist movements. So far their symbolic capital has been mainly missing and their social and political resources have been scarce”.⁹⁷¹ From the radical feminist stance that speech restrictions could be used to redress historic inequalities, this result is beneficial.

⁹⁷⁰ Pekonen, K. (ed.) *The New Radical Right in Finland*. Kопijyva: The Finnish Political Science Association, (1999), pp. 40-47.

⁹⁷¹ *Ibid.* p. 37.

Conclusion

This thesis explored the question of whether there is room for legitimate restrictions to be placed upon pornography and extreme right political organisations' racist hate speech without breaching generally accepted liberal rights. In Chapter 1, Pornography was defined in accordance with the anti-pornography radical feminist definition provided by Andrea Dworkin and Catharine MacKinnon, whilst the definition of racist hate speech used was that found in critical race theory.

In Chapter 2 two liberal rationales for sustaining freedom and freedom of speech were explored; these being rationales sustained by neutrality, which in turn were subdivided into harm and rights based approaches, as exemplified by the works of Mill and Dworkin respectively; and rationales sustained by autonomy, as exemplified by Raz's communitarian/perfectionist approach. It was concluded that when considering neutrality based approaches, the radical feminist position does not appear illiberal per se. Radical feminists think freedom of speech and rights are important, but, similar to liberals, they believe that these freedoms need to be limited when their exercise prevents others exercising them. Yet, they argue liberals do not fully recognise the degree of harm speech can cause. In particular, they find a concern for harms derived from domination lacking in the liberal position. The autonomy rationale, meanwhile, seemed the most suited to the radical feminist stance, this approach allowing greater room for restrictions upon speech. Despite the autonomy approach being more suitable for the radical feminist position, though, a significant issue remains. It is apparent from the three perspectives assessed that although these could be stretched to include some restrictions upon pornography, namely restrictions upon public displays, the case of racist hate speech of extreme right political organisations is more problematic. The primacy that political speech is given within liberalism means that restrictions could not be placed upon it.

In an attempt to redress the discrepancies between the radical feminist and the liberal position, in Chapter 3 the republican stance of freedom was assessed. It was concluded that the republican concept of

freedom as non-domination had a greater number of parallels to the radical feminist position than a liberal conception of freedom. The republican conception of freedom, with power and domination at its centre, meant that those concerns which were not tackled by liberal theory could be addressed. Freedom as non-domination seemed to articulate the radical feminist concerns in a way that the radical feminists themselves do not achieve. Moreover, the issue of the domination of women by pornography is directly addressed within republican theory.

Chapter 4, which set out the radical feminist concerns, continued the exploration of an alignment between the radical feminist position and republicanism. Here, the two principal aims of the thesis were laid out. The first aim was to move the radical feminist position out of the liberal theory framework by which it has been constrained. The second aim was to apply the radical feminist stance on pornography to the issue of extreme right political organisations' racist hate speech, using a critical race theory definition of racist hate speech.

The sex-wars debates on pornography within feminism of the 1970s and 1980s, out of which the pro-sex and anti-pornography radical feminists emerged, were contained, despite their differences, by a negative conception of freedom as non-interference. The two stances have a conception of negative freedom, freedom being regarded by them as freedom *from* repressive sexual norms.⁹⁷² For the radical feminists, these norms are patriarchy; whilst for the pro-sex feminists, they are heterosexism and sex negativity.⁹⁷³ As a result, the focus has been on whether pornography results in tangible harms to women. Such a focus, though, has meant that there is a considerable burden of proof holding the radical feminist position accountable, it being extremely difficult to prove direct harm in cases of speech.

It is due to this burden of proof and the difficulties and criticisms that have arisen as a result of it, that I propose a move away from the liberal

⁹⁷² Sawicki, J. *Disciplining Foucault – Feminism, Power, and the Body*. New York: Routledge, (1991), pp. 35-36.

⁹⁷³ Glick, E. Sex Positive Feminism, Queer Theory, and the Politics of Transgression. *Feminist Review*. No. 64, (Spring 2000), p. 21.

framework. I wanted to see whether a different conception of freedom would be more beneficial to the radical feminist position. Due to this concern, I focused on a republican conception of freedom as non-domination. As mentioned above, a republican conception of freedom as non-domination takes into account some of the concerns that the radical feminists find with the liberal position: namely, a lack of focus on power and domination. Republican theory, unlike liberalism, also has an acceptance within it of performative speech acts, which is alienable to the radical feminist position and its claim that pornography and racist hate speech gain some of their advocacy as speech acts due to their performative nature.

More importantly, though, from the republican conception of freedom as non-domination it is not interference per se, or harm as a form of interference, which is the central concern. The focal point of this republican position is the capacity to arbitrarily interfere with another, otherwise referred to as domination. Therefore, the burden of proof that has constrained the radical feminist position may be circumvented from this perspective. Proof of any actual harm caused by pornography need not be an issue. Rather, it is the creation of an environment whereby women may feel that they could be arbitrarily interfered with by men and the promotion of this perception through pornography that is at stake.

The alignment between the radical feminist position and a republican conception of freedom as non-domination also aids in the second aim of this thesis. Critical race theory has focused - when considering the possibility of restrictions upon racist hate speech - on individual addresses and injury. The radical feminist position on pornography, though, recognises harms to individuals as members of a group. Moreover, it is concerned with an industry's speech production, namely the pornographic industry's. Such an industry has more in common with a political organisation than with an individual and her speech utterances. Hence, the radical feminist stance aids in the extension of the critical race theory position to include within the realm of restricted racist hate speech that of extreme right political organisations. Although critical race theorists highlight a concern with the extreme right, they have also been constrained by a liberal framework and the burden of

proof mentioned in the case of pornography. Extreme right political organisations, though, when considered from the perspective of freedom as non-domination, may also be regarded as creating an environment whereby the victims of the speech may feel that they could be arbitrarily interfered with by the dominant majority.

The creation of an environment whereby the targets of both these forms of speech may feel that they could arbitrarily be interfered with is furthered by them being historically oppressed groups. Within the context of Western societies, women and ethnic minorities have been subjected to a lower status at different times, with actual levels of equality not having yet been reached. These concerns help the alignment between republicanism and the radical feminist position. As explored in Chapter 3, critical republicans embrace such concerns, concerns that are not found in the liberal stance. Cécile Laborde in her outline of critical republicanism accepts that social norms can result in domination. As an example, she identifies sexism; arguing how despite women having an equal status as citizens, they are socially dominated by unfair labour markets, unequal pay and objectification.⁹⁷⁴ Furthermore, she argues that for non-domination to be achieved, obstacles to full citizenry participation must be removed,⁹⁷⁵ be they socio-economic, in the form of substantive opportunities, or symbolic and discursive, in the form of dominating social norms and ethnocentric rules. Such a position is tailored towards the inclusion of historically excluded groups, in particular women and ethnic minorities. Laborde identifies different ways in which women may be dominated, “both by being denied the opportunity to develop their own perspective (autonomy denial) and by being led to adopt attitudes of subservience, self-denial, and servility, which make them vulnerable to further domination (autonomy-dismissal)”.⁹⁷⁶

Through an alignment with a republican conception of freedom as non-domination, it is therefore possible to conclude that there is legitimate room for restrictions upon pornography and the racist hate speech of

⁹⁷⁴ Laborde, C. *Critical Republicanism – The Hijab Controversy and Political Philosophy*. Oxford: Oxford University Press, (2008), pp. 16-17.

⁹⁷⁵ *Ibid.* p. 18.

⁹⁷⁶ *Ibid.* p. 154.

extreme right political organisations. Such speech may be considered as a breach of freedom, therefore its restriction would add not only to overall freedom but to equality.

Once this normative work was completed, the thesis set out to address the propositions that:

- *A republican constitution offers a basis for limiting both pornography and racist hate speech while securing a normal range of liberal rights.*
- *Whilst liberals would argue that securing these rights also requires allowing freedom for racist hate speech and pornography.*

In order to address these propositions, in Chapter 5 a blueprint was drawn up to ascertain what form a republican and a liberal constitution might take. The constitutions of the two case study countries, Spain and Finland, were matched to the table in order to determine the extent to which it is possible to read the Spanish Constitution from a liberal perspective and the Finnish Constitution from a republican perspective. Despite similarities between the two states' constitutions, in part due to a historical intertwining between republicanism and liberalism, a tendency towards liberalism was noted in Spain and a tendency towards republicanism was noted in Finland. For the most part, these tendencies were demonstrated by, in Finland, rights being politically, as opposed to merely legally, defined; and there being considerable ease with regard to the possibility of changing the constitution. In Spain, meanwhile, rights, as well as the possibility for constitutional change, were entrenched, making the possibility of change less likely.

Having established that the Spanish and Finnish Constitutions could be aligned with liberalism and republicanism, in turn, Chapters 7 and 8 illustrated how the legislation in these countries regarding pornography and racist hate speech could be interpreted. It was concluded that in Spain, there were virtually no restrictions, whilst in Finland, restrictions on both these forms of speech have at some point been in place.

From the concluding point of this thesis there is considerable further research that could be carried out. A further line of enquiry would be to look at what restrictions may actually be implemented upon these forms of speech, as opposed to merely concluding that there is the possibility for

some form of restrictions to be implemented. In addition, with regard to pornography there were some elements which were beyond the scope of this thesis, in particular issues relating to child and homosexual pornography. With regard to the extreme right meanwhile, it would be useful to assess what sort of political organisations could have their speech restricted from a republican perspective. An empirical case study analysis, as opposed to the illustration that was presented here, would also prove useful.

Appendix 1

Interview Professor K Pekonen – Extreme Right in Finland

24/09/09

There was a history of far right in Finland in the 1930s.

The ban had an impact on the lack of far right in Finland (ban from 44 until 91).

Political atmosphere from the 1950s until the collapse of the Soviet Union was one of close relations with the USSR.

This led to the far right being regarded as very dangerous.

Since the ban was removed there have been no competent far right leaders in Finland.

Ordinary people do not believe they can be trusted.

5000 signatures are needed for a far right party to become an official party.

One party has succeeded in achieving this and got on the party list.

But they have had no electoral success.

If during two electoral terms (8 years) a party does not have an MP elected then they cannot continue on the official party list – this is what has happened to the far right.

As a result of this the same parties often change their names in order to re-register. But the same people remain in power.

Most people – including the main political parties in Finland – do not consider that there is a far right threat.

True Finns – populist party – has had some considerable achievements. At the last elections received 10% of the public vote.

The leader is a parliamentarian though. Not a personality leader like Le Pen. He has been very careful not to be associated with the far right.

He is concerned about some groupings within his own party as he does not want them becoming more extreme right.

There is no real underground or outside of politics far right groups in Finland. Early 90s there was a skinhead movement.

This has now declined.

70s-80s the main skinhead leader – Peko Siten – was extremely eccentric and so could achieve little support.

There remain no formal restrictions on far right parties in Finland.

There are virtually no academics working on the far right in Finland.

There is some historical research happening on figures who opposed the link to the Soviet Union.

The far right will probably rise – the Finnish political system in this sense is no different from any other.

Locally there is some concern amongst Finns with immigration. Immigrants tend to live in close communities and so locals do not like this. This is even a problem in small villages.

The main immigrant group are Russians. Although due to history people dislike them there is an acceptance that Russians and Russian tourists bring money into the country.

They have therefore not necessarily been considered the biggest problem.

There are issues with the concerns over the Russian mafia and prostitution and people smuggling.

In Helsinki the problem are Somalis. It is now easier to get into Finland than into the Scandinavian countries as an immigrant – people see this as problematic.

People are currently being prosecuted for hate speech – Islamophobia.

Some of these people have attempted to gain access to other European countries far right organisations and form alliances – but they have failed.

Only one of them has achieved the 5000 supporting signatures necessary to become an official party; this being The Finnish People's Blue-Whites (*Suomen Kansan Sinivalkoiset* – SKS). However, in accordance to Finnish law if during two consecutive electoral terms a party does not have a member of Parliament elected then they cannot continue on the official party list; which has been the case with the SKS. The SKS, founded in 2002, was as a consequence of not having any members of parliament elected, removed from the party list in 2007. The SKS, though, did succeed in having city council members elected in the city of Turku.

The most notorious far right political activist to have been sentenced under hate speech legislation is Seppo Lehto. Lehto, who created a number of internet blogs containing racist material, was sentenced in May 2008 to two years and four months imprisonment for ethnic agitation. From the one party to have been registered in the Finnish official party list, the SKS, Olavi Mäenpää, a Turku city council member was sentenced in March 2009 to 50 days imprisonment for ethnic agitation.

A Helsinki City Council member representing the *True Finns* has also been prosecuted under hate speech legislation. Jussi Halla-aho was sentenced in

September 2009 for racist writings against, predominantly, Africans; Halla-aho was fined €330.

Follow-up Interview – November 2010

There are some formulations and connotations that could be discussed – I mean connotations that also the Finnish researchers have disagreements. One such ongoing discussion is about the racism of the True Finns. There are several points in the discussion. The latest phase in the Finnish discussion goes around the following questions: Can we say that the True Finns is a racist party taking into account that it is a very heterogeneous party, there have been at least some evident racist groups inside the party that, however, have lately been dissatisfied with the too mild and timid line of the party and have established a new party the Change 2011 (registered officially in the party register in October 2010). As you mention on page 10, Jussi Halla-aho, one of the most visible figures of the True Finns was sentenced for racist writings in 2009, but it has been interesting to see how the main Finnish media and the great public have received the sentence. Even so called enlightened public opinion seems to see the sentence as a violation of the free speech rather than as a criminal activity. Of course, journalists and lawyers who represent that enlightened public opinion say explicitly that Halla-aho's writings are stupid and disgusting but giving a sentence is an important precedent that may have far reaching consequences to other kind of cases in other contexts. It seems also that the great public does not see Halla-aho as a condemnable criminal. So, in the end it seems that the sentence has not had the effect the legislator has striven for. One important point in the ongoing discussion concerns the basic question of racism: how do we understand it. As you know, nowadays the question is usually about some kind of cultural racism and the problem is its fluid contours. Here the question is about that if the party is racist what kind of racism the members and firm supporters of the True Finns represent. And more broadly, according to the latest survey published last Tuesday the support of the True Finns among Finnish voters is as high as 14,3 %. So big support is not possible for any openly racist party but it may, on the contrary, tell how the leader Timo Soini has succeeded in dissipating the questions of the racism of the party.

Along with the long historical heritage of the far right in Finland, we could also speak about the long tradition of populism. In the 1930's these were closely related in the Lapua movement and in the Patriotic People's Movement. After the Second World War, when the far right movements were banned, the route was at first open only for those oppositional movements whose emphasis was on populist features and tactics like the Finnish Rural Party.

Appendix 2

Finnish Ombudsman for Minorities – List of Hate Speech Cases

Translation of Sections Used

Criminal law, chapter 24, 9 § Defamation he who

- 1) brings forth untruthful information or insinuation of another person in such a way that it causes harm or suffering to that person, or leads to his/ hers contempt, or
- 2) in another way, yet unspecified in section 1, defames another person; shall be convicted of defamation to a fine or jail sentence for no longer than six months.

Defamation in moment 1, section 2 does not include criticism aimed at another person's conduct in politics, economy, public office or function, science, art, or any other comparable public conduct; and criticism that clearly does not exceed that, which can be held reasonable.

He who brings forth untruthful information or insinuation of a deceased person in such a way that causes suffering to a person who was particularly close to the deceased will also be convicted of defamation.

Tampere, municipal court decision, November 1996

A woman was convicted of defamation (old legal term, new legal term) to a fine after she had called a foreign-born man, unknown to the defendant, a "Muslim pig".

Criminal law, chapter 11, 10 §: Agitation against a group of people

He/she who publicly circulates statements or other information whereby one threatens, villifies, or defames any national, ethnic, racial, religious, or any such comparable group must be convicted of agitation against a group of people to a fine or jail sentence for no more than 2 years.

2.12 HELSINGIN KÄRÄJÄOIKEUDEN TUOMIO 8.9.2009 (Halla-aho)

Helsinki Municipal Court turned down the indictment of agitation, but convicted the man (defendant) for breaking religious peace (RL 17:10 §) to 30 day fines. The man had published the statement: "Prophet Muhammad was a paedophile, Islam sanctifies paedophilia, and therefore it is a paedophile religion. Paedophilia is Allah's will". The man had made the statement accessible to the public by publishing it on his website. The accusations in the statement had been formed in a way that targeted not only Islam's holy subjects, Muhammad and Allah, but the religion in general. Repeatedly used paedophilia-term in itself reflects particularly strong negative values. The man had attempted to illustrate his statements true by means of logic, but the court saw the logic as ostensible, regardless of the fact that the premises seemed logical. Characteristic of the case was that

the statement had been addressed to a prosecutor specialising in in this area. The stated purpose of testing the limits of free speech and prosecution does not permit conduct that breaks the law. The court upheld that it is obvious even to such people to whom Muhammad or Islam are not holy, having read the man's statements and arguments, that they contain slander and defamation, and to find them insulting. The rationale behind the arguments and their logic was not to engage in reasonable debate about the defects of Islam, but to smear the religion's holy values obstensibly on the expense of the freedom of speech.

Additionally, he had publicly circulated a statement that vilified and smeared a group of Somalis or a similar group. The statement "mugging of by-passers and feeding off tax revenue are Somalis national, if not genetic, characteristic" was published on the man's website. The court found this statement, independent of the context, as a typical so called hate speech. By only reading this statement one could conclude that the man's objective was vilified and smear Somali immigrants. By this reflection, one would have to conclude that the statement fulfils the characteristics of agitation against a group. However, the court noted that the statement showed the objective of criticising authorities' conduct as far as they had not acted upon a newspaper's main editorial that had speculated alcohol infused homicide being Finns' national, if not genetic characteristic. The man had specifically stated that his intent was not to generalise towards all Somalis. He presented statistics as evidence, and emphasised that he doesn't hold his statement as fact. The text appears to show the argument in the form of satire. The court concluded that the man did not intend to vilify or smear Somalis. The aforementioned group was randomly selected as an instrument to criticise the conduct of public authorities. The court saw the statement to lack the objective to vilify or smear, and therefore the agitation indictment was abandoned.

Viimeisin päivitys 4.6.2010

OIKEUSKÄYTÄNTÖÄ RL 24:9 § JA RL 11:10 §

1) KUNNIANLOUKKAUS, RL 24:9 §

Rikoslain 24 luku 9 §, (9.6.2000/531) kunnianloukkaus

Joka

1) esittää toisesta valheellisen tiedon tai vihjauksen siten, että teko on omiaan aiheuttamaan vahinkoa tai kärsimystä loukatulle taikka häneen kohdistuvaa halveksuntaa, taikka

2) muuten kuin 1 kohdassa tarkoitetulla tavalla halventaa toista, on tuomittava *kunnianloukkauksesta* sakkoon tai vankeuteen enintään kuudeksi kuukaudeksi.

Edellä 1 momentin 2 kohdassa tarkoitettuna kunnianloukkauksena ei pidetä arvostelua, joka kohdistuu toisen menettelyyn politiikassa, elinkeinoelämässä, julkisessa virassa tai tehtävässä, tieteessä, taiteessa taikka näihin rinnastettavassa julkisessa toiminnassa ja joka ei selvästi ylitä sitä, mitä voidaan pitää hyväksyttävänä.

Kunnianloukkauksesta tuomitaan myös se, joka esittää kuolleesta henkilöstä valheellisen tiedon tai vihjauksen siten, että teko on omiaan aiheuttamaan kärsimystä ihmiselle, jolle vainaja oli erityisen läheinen.

Törkeä kunnianloukkaus, katso rikoslain 24 luku 10 §.

1.1 TAMPEREEN KÄRÄJÄOIKEUDEN TUOMIO, MARRASKUU 1996

Nainen tuomittiin solvauksesta (nykyinen rikosnimike ”kunnianloukkaus” korvaa ”solvaus” -rikosnimikkeen) sakkorangaistukseen naisen nimitettyä hänelle entuudestaan tuntematonta nuorta ulkomaalaissyntyistä miestä ”muslimisiaksi”.

1.2 ITÄ-SUOMEN HOVIOIKEUDEN TUOMIO, LOKAKUU 1998

Luokanopettaja tuomittiin solvauksesta 20 päiväsakkoon, kun hän oli nimitellyt 14-vuotiasta karibialais-suomalaista syntyperää olevaa tyttöä ”neekeriksi”.

1.3 LAHDEN KÄRÄJÄOIKEUDEN TUOMIO 26.1.2006

Nainen tuomittiin kunnianloukkauksesta 10 päiväsakkoon, kun hän oli halventanut kolme henkilöä kutsumalla heitä heidän syntyperäänsä liittyvällä loukkaavalla nimityksellä. Kyse oli ns. ”ryssittelystä”. Nainen velvoitettiin suorittamaan vahingonkorvausta asianomistajille henkisestä kärsimyksestä. Vastaajan maksettavaksi tuli lisäksi oikeudenkäyntikuluja.

1.4 EOA:N RATKAISU

Eduskunnan apulaisoikeusasiamies on eräiden poliisimiesten toimintaa koskeneessa kanteluun antamassaan ratkaisussa todennut, että ”neekeri”-sanon käyttäminen ei kuulu asialliseen virkakieleen.

1.5 JOENSUUN KÄRÄJÄOIKEUDEN TUOMIO 4.11.2009

Nainen tuomittiin nuorena henkilönä tehdystä kunnianloukkauksesta sakkoon, kun hän oli useaan otteeseen nimitellyt venäläistä opiskelutoveriaan ”ryssäksi”, ”tyhmäksi” ja ”paskaksi” sekä todennut, että hän puhuu ”paskalaisten kieltä”. Nimitellyä oli tapahtunut lähes päivittäin eripuolilla oppilaitosta ja nimitelyyn oli kuullut usein luokkahuoneellinen opiskelijoita.

Nimittely oli kestänyt kahdeksan kuukautta ja se oli syvästi loukannut kantajaa. Vastaajan katsottiin halventaneen venäläistä opiskelijaa nimittelemällä häntä.

Nainen tuomittiin nuorena henkilönä tehdystä kunnianloukkauksesta sakkoon, 15 päiväsakkoa á 6 euroa = 90 euroa. Vastaaja tuomittiin tämän lisäksi maksamaan kantajalle 300 euroa henkisestä kärsimyksestä. Oikeus käytti rangaistusta määrätessään RL 6 luvun 5 §:n 4 kohdan mukaista koventamisperustetta, koska teko kohdistui venäläiseen henkilöön kansanryhmään kuulumisen perusteella ja motiivina oli nimenomaan kantajan Venäjän kansalaisuus.

Kantaja nosti itse asiassa syytteen sen jälkeen, kun virallinen syyttäjä oli tehnyt syyttämättäjäättämispäätöksen.

Tuomio on lainvoimainen.

2 KIIHOTTAMINEN KANSANRYHMÄÄ VASTAAN, RL 11:10 §

Rikoslain 11 luvun 10 § (11.4.2008/212) kiihottaminen kansanryhmää vastaan

Joka yleisön keskuuteen levittää lausuntoja tai muita tiedonantoja, joissa uhataan, panetellaan tai solvataan jotakin kansallista, etnistä, rodullista tai uskonnollista ryhmää taikka niihin rinnastettavaa muuta kansanryhmää, on tuomittava *kiihottamisesta kansanryhmää vastaan* sakkoon tai vankeuteen enintään kahdeksi vuodeksi.

Ennen 1.5.2008 voimassa ollut pykälä; Rikoslain 11 luku 8 § (21.4.1995/578), kiihottaminen kansanryhmää vastaan

Joka yleisön keskuuteen levittää lausuntoja tai muita tiedonantoja, joissa uhataan, panetellaan tai solvataan jotakin kansallista, rodullista, etnistä tai uskonnollista ryhmää taikka niihin rinnastettavaa kansanryhmää, on tuomittava *kiihottamisesta kansanryhmää vastaan* sakkoon tai vankeuteen enintään kahdeksi vuodeksi.

2.1 ROVANIEMEN HOVIOIKEUDEN TUOMIO 2.2.1999

Mies tuomittiin kiihottamisesta kansanryhmää vastaan 30 päiväsakkoon, kun hän oli kotisivuillaan internetissä levittänyt yleisön keskuuteen tekstejä, joiden kielenkäyttö oli sopimatonta, räikeää ja osittain myös uhkaavaa sekä tiettyjä ryhmiä (pakolaisia, muslimeja, juutalaisia, somalialaisia ja ns. "neekereitä") ikävällä tavalla nimittelevää ja halventavaa. Asiassa ei tullut näytetyksi, että vastaaja olisi suoranaisesti tiedottanut tai lähettänyt tiedonantojaan kenellekään taikka ilmoittanut niistä palvelimien uutisryhmien kautta. Hovioikeus katsoi kuitenkin käräjäoikeuden tuomiosta ilmenevillä perusteilla,

että vastaaja oli lainkohdassa tarkoitettulla tavalla levittänyt mainittuja tiedonantoja yleisön keskuuteen.

2.2 HELSINGIN HOVIOIKEUDEN TUOMIO 13.9.2006

Mies tuomittiin kiihottamisesta kansanryhmää vastaan ja uskonrauhan rikkomisesta 50 päiväsakkoon, kun hän oli kirjassa levittänyt yleisön keskuuteen lausuntoja, joissa paneteltiin ja solvattiin juutalaisia. Käräjäoikeuden tuomion perusteluissa todetaan, että kirjan esipuheessa esitetyt väittämät ovat tyyppillistä ns. antisemitististä propagandaa. Vastaaja oli kiistänyt tarkoittaneensa aiheuttaa juutalaisiin kohdistuvaa vihamielisyyttä ja syrjintää. Käräjäoikeus totesi, että tahallisuus on kuitenkin pääteltävissä väittämistä itsestään. Käräjäoikeuden mukaan väitteiden perusteella oli selvää, että vastaajalla oli ollut pyrkimys saada aikaan lukijoissa samanlainen halveksunta juutalaisia kohtaan kuin hänellä itsellään on. Tahallisuutta ei käräjäoikeuden mukaan poistanut se, että vastaaja itse piti väitteitään totuudenmukaisina.

Helsingin hovioikeuden mukaan aihetta käräjäoikeuden ratkaisun muuttamiseen ei ollut ilmennyt, eikä KKO myöntänyt vastaajalle valituslupaa, jolloin käräjäoikeuden ratkaisu tuli lainvoimaiseksi.

2.3 HELSINGIN HOVIOIKEUDEN TUOMIO 25.5.2007

Mies tuomittiin kiihottamisesta kansanryhmää vastaan 30 päiväsakkoon, kun hän oli yleisön keskuuteen levittänyt lausuntoja ja tiedonantoja, joissa paneteltiin ja solvattiin uskonnollista ryhmää. Mies oli toimittanut kirjoituksensa muutamien lehtien toimituksiin julkaisemista varten. Kirjoitus julkaistiin kahden lehden mielipidesivuilla. Menettelyllään mies levitti yleisön joukkoon lausunnon, jossa hän esittää kolmannen valtakunnan juutalaisiin kohdistaman joukkotuhonnan hyväksyttävänä ja toivottamana toimenpiteenä. Käräjäoikeuden tuomion perusteluissa esitettiin muun muassa, että kyseessä oleva lause on ollut sisällöltään ja tyyliältään räikeä. Ennen kaikkea se on suunnattu juutalaisiin, jotka kansanryhmänä eivät voi olla syyllisiä Lähi-idän tapahtumiin. Lausetta ei käräjäoikeuden mukaan voitu sananmuotonsa mukaan käsittää vitsiksi, ei edes epäonnistuneeksi sellaiseksi. Sitä ei myöskään voitu pitää minään relevanttina kannanottona Israelin politiikkaan kuvatessaan hyväksyvään sävyyn ennen tämän valtion muodostamista sattunutta kansanmurhaa.

Lehden varapäätoimittaja tuomittiin yllä mainitussa asiassa kiihottamisesta kansanryhmää vastaan 30 päiväsakkoon, kun hän oli yleisön keskuuteen levittänyt lausuntoja ja tiedonantoja, joissa paneteltiin ja solvattiin uskonnollista ryhmää, koska hän oli harkitusti hyväksynyt yllä mainitun kirjoituksen julkaisemisen.

Mies oli lehden varapäätoimittaja ja oli toimiessaan päätoimittajan sijaisena lukenut yllä mainitun kirjoituksen, tullut tietoiseksi sen sisällöksi sekä päätöksellään hyväksynyt kirjoituksen julkaisemista varten. Miehen menettelynsä johdosta kirjoitus julkaistiin lehden mielipidesivuilla.

Toisen lehden vastaava toimittaja tuomittiin päätoimittajarikkomuksesta 10 päiväsakkoon, kun hän oli huolimattomuudesta olennaisesti laiminlyönyt toimitustyön johtamis- ja valvontavelvollisuutensa siten, että laiminlyönti oli ollut omiaan myötävaikuttamaan yllä mainitun kirjoituksen julkaisemiseen. Toimituksessa tapahtuneen virheen vuoksi yllä mainittua kirjoitusta ei poistettu julkaistavaksi tarkoitetun aineiston joukosta seurauksin, että kirjoitus sellaisenaan julkaistiin lehdessä. Vastaava toimittaja ei ollut puuttunut epäselvään ja riskialttiiseen käytäntöön.

2.4 TUUSULAN KÄRÄJÄOIKEUDEN TUOMIO 14.1.2008

Mies tuomittiin kiihottamisesta kansanryhmää vastaan 25 päiväsakkoon. Lisäksi tietyt lainvastaiset verkkoviestit määrättiin poistettaviksi yleisön saatavilta ja hävitettäväksi. Mies oli internetissä olevalla sivustollaan yleisön keskuuteen levittänyt lausuntoja tai muita tiedonantoja, joissa paneteltiin ja solvattiin mm. maahanmuuttajia, turvapaikanhakijoita, afrikkalaisia ja romaniväestöön kuuluvia ihmisiä. Tekijä oli itse luonut osan julkaisemistaan lausunnoista, osa aineistosta koostui lausunnoista, joita hän oli kerännyt ja koostanut sivustolleen muista lähteistä. Muualta hankitun aineiston yhteyteen hän oli liittänyt omia kommenttejaan. Tekijä oli lausunnoissaan mm. esittänyt, että ko. kansanryhmiin kuuluvat ihmiset ovat vaarallisia, koska he ovat luonteeltaan niin väkivaltaisia ja koska he syyllistyvät rikoksiin niin usein. Lausunnot olivat ko. ryhmiä panettelevia ja solvaavia, koska niissä vahvasti yleistäen kuvataan kokonaiset kansanryhmät alkeellisina, tyhminä, rikollisina ja loisina. Lausunnot loukkaavat ko. ryhmiin kuuluvien ihmisten ihmisarvoa. Rangaistuksen määrään on osittain vaikuttanut se, että tekijän rikosrekisterin ote on rikkeetön.

Tuomio on lainvoimainen.

2.5 APULAISVALTAKUNNANSYTTÄJÄN PÄÄTÖS SYYTTÄMÄTTÄ JÄTTÄMISESTÄ 28.2.2008

Kyse oli internetsivuston ylläpitäjän ja julkaisijan toiminnasta. Rikoksesta epäiltynä kuultu mies oli kertonut olevansa vastuussa tutkinnan kohteena olevan sivuston sisällöstä. Sivusto oli poistettu internetistä. Mies oli kiistänyt syyllistyneensä rikokseen. Syyttämättäjättämispäätökseen vaikutti muun muassa se, että mies oli tutkinnan kohteena olevien kirjoitusten aikana ollut tuolloin rekisteröityneen puolueen eduskuntavaaliehdokas

ja että mies oli julkaissut tekstinsä osana poliittista kampanjaansa. Päätöksessä todetaan, että asia on tässä suhteessa poikkeuksellinen. Päätöksessä todetaan, että kirjoitustyyli muistuttaa kohdittain kansallissosialistisissa julkaisuissa käytettyä, paikoin aggressiivista tyyliä. Lisäksi todetaan, että kirjoituksiin sisältyy muutama kohta, jotka apulaisvaltakunnansyyttäjän mukaan ylittävät sellaisinaan, mitä sananvapauden nimissä voidaan pitää hyväksyttävänä. Koska kirjoituksen sisältöä oli muutoin pidettävä suojatun poliittisen sananvapauden piiriin kuuluvana, ei katsottu, että miestä olisi voitu katsoa syyllistyneen kiihottamiseen kansanryhmää vastaan ykistään tämän lauseen vuoksi.

- liitetty kirjoitus (toisen henkilön kirjoittama), joka sisälsi ns. vihapuhetta. Viittaus eduskunnan perustuslakivaliokunnan mietintöön PeVM 14/2002 vp ("...palstan ylläpitäjän rikosoikeudellinen vastuu voi tulla arvioitavaksi, jos tämä esim. sallii palstan muodostuvan rikollisten viestien julkaisukanavaksi...") Kirjoitus oli poistettu noin 1,5 kk:n jälkeen.

2.6 ESITUTKINNAN RAJOITTAMISTA KOSKEVA PÄÄTÖS 8.5.2008 (VKSV:n Dnro 554/27/07)

Apulaisvaltakunnansyyttäjä päätti poliisin ehdotuksesta, ettei esitutkintaa toimiteta. Päätöksessä todetaan muun muassa seuraavaa: "Jos esitutkinta toimitettaisiin loppuun ja jos rikokseen liittyvät näyttö- ja oikeuskysymykset saataisiin syyksi lukevan ratkaisun edellyttämällä varmuudella esitutkinnassa selvitettyä, tulisin, käytettävissä olevan aineiston valossa arvioituna, tekemään asiassa seuraamusluonteisen syyttämättäjäätämispäätöksen rikoksen vähäisyyden vuoksi oikeudenkäynnistä rikosasioissa annetun lain 1 luvun 7 §:n 1 kohdan nojalla."

Kyse oli ylioppilaskunnan julkaisemasta vitsijulkaisusta. Vappulehdessä eri kansanryhmiä kuvailtiin työtä vieroksuvina, sosiaaliturvan väärinkäyttäjinä, sairaina HIV-viruksen kantajina ja levittäjinä sekä eläimiin sekaantujina. Myös neekeri -sanaa käytettiin. Ratkaisun perusteluissa todetaan, että "...vitsit ja muut julkaisun laatijoiden omasta mielestään hauskoina pitämät kirjoitukset voivat asiayhteydestä riippuen täyttää nyt puheena olevan rikoksen tunnusmerkistön." Päätöksessä viitataan apulaisvaltakunnansyyttäjän 16.2.2006 tekemään syyttämättäjäätämispäätökseen asiassa R 05/24, jossa katsottiin, "...että internetissä yleisön saatavilla ollut vitsisivusto ei täyttänyt ...rikostunnusmerkistöä. Siinä oli kysymys ns. juutalaisvitsisivustosta, joka muodosti osan huomattavan suuresta vitsikokoelmasta. Totesin sanotussa ratkaisussani, että vaikka ainakin osaa tutkituista juutalaisvitseistä oli pidettävä varsin loukkaavina, ei sivuston ylläpitämisessä sellaisenaan

vielä ollut kysymys rikoslain 11 luvun 8 §:n tarkoittamasta kiihottamisesta kansanryhmää vastaan. Tutkintapyyntöissä tarkoitettu aineisto on myös eräänlainen vitsikokoelma. Tutkintapyyntöissä mainitut ja arvionikin mukaan loukkaavat viestit ovat vain pieni osa julkaisun muodostamasta kokonaisuudesta...”

2.7 KOUVOLAN HOVIOIKEUDEN TUOMIO 13.1.2009 (Kunnas)

Hovioikeus pysytti Imatran kärjäoikeuden 3.9.2008 antaman tuomion, jossa mies tuomittiin 60 päiväsakkoon kiihottamisesta kansanryhmää vastaan. Syyttäjä oli hovioikeudessa vaatinut, että rangaistus kovennetaan ehdolliseksi vankeudeksi. Mies oli suomi24 -keskustelupalstalla yleisön keskuuteen levittänyt lausunnon, jossa paneteltiin ja solvattiin romaneita. Lausunto oli ollut yleisön saatavilla internetissä kaikkien nähtävillä kaksi päivää. Mies oli julkaisemassaan lausunnossaan esittänyt, että sanottuun kansanryhmään kuuluvat ihmiset ovat rikollisia ja nämä ihmiset ovat muiden kustannuksella eläviä loisia. Edelleen lausunnossa oli esitetty, että sanottuun ryhmään kuuluvat ihmiset muodostavat yleisen ongelman ja että heistä aiheutuu yleistä haittaa. Lausunnossa oli myös esitetty, että näitä ihmisiä voisi hävittää kuten haittaa aiheuttavia eläimiä. Lausunto katsottiin olevan romaneita voimakkaasti panetteleva ja solvaava, koska siinä vahvasti yleistäen kuvattiin kokonaiseen kansanryhmään lukeutuvat ihmiset rikollisina ja loisina ja näitä ihmisiä verrattiin eläimiin, joihin on luvallista kohdistaa äärimmäistä väkivaltaa. Lausunto todettiin loukkaavan vakavasti sanottuun ryhmään kuuluvien ihmisten ihmisarvoa.

KKO:lta ei haettu valituslupaa, tuomio on lainvoimainen.

2.8 HELSINGIN HOVIOIKEUDEN TUOMIO 18.2.2009 (Peltonen)

Mies tuomittiin Helsingin kärjäoikeudessa 15.1.2008 kiihottamisesta kansanryhmää vastaan 30 päiväsakkoon. Lisäksi hänet tuomittiin menettämään valtiolle tietyn julkaisun kaikki kappaleet. Mies oli levittänyt mm. turvapaikanhakijoita, afrikkalaisia, romaneita, muslimeita ja juutalaisia solvaavia ja panettelevia lausuntoja kirjoittamassaan kirjassa, jota oli painettu 200 kappaletta ja lähetetty eri henkilöille yhteensä ainakin 17 kappaletta. Lausunnoissa esitettiin mm., että sanottuihin ryhmiin kuuluviin ihmisiin tulisi kohdistaa suoria toimenpiteitä heidän poistamiseksi maasta. Lausunnoissa on myös pidetty kolmannessa valtakunnassa juutalaisiin, romaneihin ja eräisiin muihin kansanryhmiin toimeenpantua joukkotuhontaa hyväksyttävänä ja toivottuna toimenpiteenä. Lausunnot pidettiin ko. kansanryhmiä uhkaavia, solvaavia ja panettelevia, koska niissä esitettiin ko. ihmiset kohteina, joihin syrjivä kohtelu ja äärimmäiset väkivaltatoimet ovat sallittuja ja myös toivottuja.

Käräjäoikeuden perusteluissa todetaan mm. seuraavaa: "...Vaikka runomuotoon puetut ilmaisut olisi osaksi tarkoitettu satiiriksi ja siksi esitetty kärjekkäinä, on kirjassa näihin kansanryhmiin, erityisesti juutalaisiin - muun muassa heidän joukkotuhoonsa myötämielisesti suhtautuen - kohdistettu siksi törkeitä lausumia, että niitä on pidettävä sananvapauden rajat ylittävinä. Kirjaa kokonaisuutenakin tarkastellen kyse on sellaisesta rasistisesta propagandasta, jota ei voi lain ja mainittujen kansainvälisten sopimusten nojalla julkisesti levittää...Kirjan painosmäärää ja edelleen levittäminen huomioiden tekijän ilmeisenä pyrkimyksenä on ollut saada aikaan toisissa samanlainen halveksunta kirjassa mainittuja kansanryhmiä kohtaan kuin hänellä itselläänkin on."

Helsingin hovioikeus antoi asiassa tuomion 18.2.2009, käräjäoikeuden tuomiota ei muuteta.

Korkein oikeus päätti 11.8.2009 olla myöntämättä asiassa valituslupaa. Tuomio on lainvoimainen.

2.9 HELSINGIN HOVIOIKEUDEN TUOMIO 16.4.2010 (Mäenpää)

Käräjäoikeus tuomitsi 17.3.2009 miehen 50 päiväsakkoon kiihottamisesta kansanryhmää vastaan. Mies oli yleisön keskuuteen levittänyt lausuntoja, joissa paneteltiin ja solvattiin tiettyjä etnisiä ryhmiä ja pakolaisia. Mies oli antanut lausuntonsa eduskuntavaaleihin liittyvässä vaalitentissä, joka esitettiin suorassa lähetyksessä TV:ssä. Mies oli antanut lausuntonsa eduskuntavaaliehdokkaan ominaisuudessa tietoisena siitä, että hänen lausuntonsa toimitetaan yleisön saataville suorassa lähetyksessä. Mies oli lausunnossa muun muassa esittänyt, että sanottuihin ryhmiin kuuluvat ihmiset väärinkäyttävät saatavilla olevaa sosiaaliturvaa ja että nämä ihmiset ainoastaan vievät suomalaisilta rahaa. Hän oli esittänyt hyväksyttävänä, että rikokseen syyllistyneeseen pakolaiseen tai maahanmuuttajaan tulisi voida kohdistaa rangaistustoimia omankäden oikeutuksella. Hän oli edelleen lausunut, että maahanmuuttajat "eivät tule tätä maata milloinkaan rakentamaan, tilastoja kaunistamaan muuta kuin ainoastaan rikoksilla". Hän oli myös esittänyt tietyistä ryhmistä halventavia nimityksiä. Tuomion perusteluissa todetaan muun muassa, että mies on antanut lausuntonsa olosuhteissa, joissa demokraattisen yhteiskunnan tarve toiminta on taannut hänelle hyvin laajan sananvapauden, hänen osin ns. vihapuheeksi luokiteltavat ja osin muuten törkeät väitteensä ovat ylittäneet sananvapauden rajat tekoajankohtana voimassa olleen rikoslain 11 luvun 8 §:ssä tarkoitettulla tavalla. Edelleen todetaan, että hän ei ole missään vaiheessa pyrkinyt korjaamaan tai pehmentämään kantaansa ja että lausumien sisältö on siinä määrin törkeä, että hän ole voinut olla ymmärtämättä niiden

rikollista luonnetta. Tästä johtuen mies oli käräjäoikeuden mukaan tahallaan syyllistynyt rikokseen.

Hovioikeuden tuomio 16.4.2010, käräjäoikeuden tuomiota ei muuteta.

Vastaaja on ilmoittanut hakevansa valituslupaa KKO:lta.

2.10 TURUN HOVIOIKEUDEN TUOMIO 26.6.2009 (Lehto ja Heikkilä)

Turun hovioikeus pysytti Tampereen käräjäoikeuden 30.5.2008 antaman tuomion, jossa mies tuomittiin kiihottamisesta kansanryhmää vastaan, uskonrauhan rikkomisesta sekä seitsemästä törkeästä kunnianloukkauksesta yhteiseen vankeusrangaistukseen 1 vuosi 2 kuukautta ehdollista vankeutta. Ehdollisen vankeusrangaistuksen ohella hän sai 60 päiväsakkoa. Toinen mies tuomittiin samassa asiassa kiihottamisesta kansanryhmää vastaan, uskonrauhan rikkomisesta sekä yhdeksästä törkeästä kunnianloukkauksesta ehdottomaan vankeusrangaistukseen 2 vuotta 4 kuukautta (ml. aiempi 3 kuukauden ehdollinen vankeusrangaistus). Miehen sotilasarvo tuomittiin menetetyksi. Valtiolle takavarikoitiin tietokoneen kovalevy ja cd-levy. Käräjäoikeus määräsi myös poistettavaksi yleisön saatavilta ja hävitettäväksi sisällöltään lainvastaiseksi todetut verkkoviestit (40 verkkoviestiä, lähinnä osoitteessa blogspot.com). Molemmat miehet tuomittiin maksamaan vahingonkorvausta (2.000-7.500e/asianomistaja) sekä oikeudenkäyntikulujen korvausta törkeiden kunnianloukkauksrikosten asianomistajille.

Miehet olivat laatineet ja toimittaneet internetissä yhteensä 41 sivustoa käsittävän, erittäin suuren määrän tekstiä ja kuvia sisältävän aineiston. He olivat myös toimittaneet internetissä yleisön saataville yhteensä kymmenen puhuttua tekstiä sisältävää äänitettä. He olivat muun muassa samaistaneet afrikkalaista alkuperää olevat ihmiset sekä muslimit eläimiin ja verranneet heitä sairauksiin; esittäneet sanottuihin ryhmiin kuuluvat ihmiset vahvasti yleistäen tautien levittäjiksi, loisiksi, raiskaajiksi ja muutoin rikollisiksi sekä muutoin vastaavin tavoin halventaneet heitä; ilmeisessä solvaamistarkoituksessa käyttäneet afrikkalaista alkuperää olevista ihmisistä ”neekerit” nimitystä sen eri muodoissa ja venäläisistä ”ryssä” nimitystä; ilmeisessä solvaamistarkoituksessa julkistaneet piirroksia, jotka esittävät afrikkalaista alkuperää olevia ihmisiä halventavalla tavalla; ilmeisessä solvaamistarkoituksessa julkistaneet piirroksia, jotka esittävät islamin uskontoon ja kulttuuriin liittyviä aiheita halventavalla tavalla. Tuomion perusteluissa todetaan muun muassa seuraavaa: ”...kirjoitusten ja ääni- ja kuvataallenteiden sisältö on ollut poikkeuksellisen halventavaa sisältäen räikeää pornografiaa, halventavia

seksuaalisen suuntautumiseen liittyviä lausuntoja, rasistisia ja uskontoa sekä vakaumusta loukkaavia lausumia ja väitteitä... Tapauksessa kysymys ei ole ollut laillisesta yhteiskuntakriitikistä tai sananvapauden sallimasta arvostelusta. Menettely on räikeästi ylittänyt sen, mikä on laillisen kritiikin ja arvostelun puitteissa sallittua...Kysymyksessä ei edes ollut laillisesta arvostelusta tai sallitusta kritiikistä, koska X ja Y ovat kiistäneet olleensa sivustojen takana eivätkä siten tunnustautuneet lausumien esittäjiksi.”

KKO päätti 8.12.2009, ettei valituslupaa myönnetä. Tuomio on lainvoimainen.

2.11 TURUN KÄRÄJÄOIKEUDEN TUOMIO 26.8.2009 (Alander)

Mies tuomittiin 26.8.2009 Turun käräjäoikeudessa kiihottamisesta kansanryhmää vastaan 50 päiväsakkoon á 6 euroa = 300 euroa. Mies oli levittänyt yleisön keskuuteen lausuntoja, joissa paneteltiin ja solvattiin afrikkalaista alkuperää olevista ihmisistä koostuvia etnisiä, kansallisia tai niihin rinnastettavia ryhmiä sekä muslimeista koostuvaa uskonnollista tai siihen rinnastettavaa ryhmää. Mies oli laatinut internetin avoimelle keskustelupalstalle viestin, jossa hän oli mm. todennut ”voin sanoa suoraan, etten pidä neekereistä, ählämeistä ja muusta roskaväestä paskan vertaa”.

Oikeuden mukaan mies oli lausumissaan väittänyt, että kyseiset ihmiset ovat ”roskaväkeä”. Lausunto on kyseisiä ihmisryhmiä solvaava ja panetteleva, koska niissä vahvasti yleistäen kuvattiin kokonaiset kansanryhmät alkeellisina ja syntyperäisiä suomalaisia alemmalla tasolla olevina ihmisinä. Lausunto loukkaa sanottuihin ryhmiin kuuluvien ihmisarvoa. Vastaja kiisti syyllistyneensä rikokseen, koska kyseessä oli hänen mielipiteenilmaisunsa. Oikeuden mukaan se, että kyse on mielipiteenilmaisusta, ei muuta sitä tosiasiaa, että kyseessä on RL 11:10 §:ssä tarkoitettu lausunto tai muu tiedonanto, jossa on paneteltu ja solvattu mm. afrikkalaista syntyperää olevista ihmisistä koostuvia ryhmiä.

Tuomio ei ole lainvoimainen, asia vireillä Turun hovissa.

2.12 HELSINGIN KÄRÄJÄOIKEUDEN TUOMIO 8.9.2009 (Halla-aho)

Helsingin käräjäoikeus hylkäsi syytteen kiihottamisesta kansanryhmää vastaan, mutta tuomitsi miehen uskonrauhan rikkomisesta (RL 17:10 §) 30 päiväsakkoon. Mies oli julkaissut lausunnon ”Profeetta Muhammad oli pedofiili, ja islam pedofilian pyhittävä uskonto, siis pedofiiliuskonto. Pedofilia on Allahin tahto”. Hän oli toimittanut lausunnon yleisön saataville julkaisemalla sen internetissä olevalla sivustollaan. Väitteet oli lausunnossa muotoiltu siten, että ne yleistävät väitteen sisällön

koskemaan paitsi islamin pyhiä kohteita Muhammadia ja Allahia, myös koko uskontokuntaa. Tarkoituksellisesti toistettu pedofilia-termi omaa poikkeuksellisen voimakkaan kielteisen arvolutauksen. Mies oli pyrkinyt osoittamaan väitteensä loogisen päättelyketjujen avulla todeksi, mutta käräjäoikeus piti perusteluja näennäisinä siitä huolimatta, että ne näyttivät loogisilta. Kirjoituksen erityispiirre oli se, että se oli osoitettu tällaisiin asioihin erikoistuneelle syyttäjälle. Väitetty sananvapauden- tai syytekynnyksen rajojen selvittämistarkoitus ei oikeuta menettelyyn, joka rikkoo lakia. Oikeus totesi, että on selvää, että luettuaan miehen väitteet ja niiden perustelut myös sellaiset henkilöt, joille Muhammad tai islam eivät ole pyhiä ymmärtävät paitsi, että kysymys on herjaamisesta ja häpäisemisestä, myös pitävät väitteitä loukkaavina. Väitteiden ja niiden perustelujen tarkoituksena ei ole ollut käydä asiallista keskustelua islamin uskon epäkohdista vaan näennäisesti sananvapauden kustannuksilla häpäistä kysymyksessä olevan uskonnon pyhiä arvoja.

Lisäksi hän oli levittänyt yleisön keskuuteen lausunnon, jossa panetellaan ja solvataan somaleista koostuvaa kansallista tai siihen rinnastettavaa ryhmää. Lausunto ”Ohikulkijoiden ryöstely ja verovaroilla loisiminen on somaleiden kansallinen, ehkä suorastaan geneettinen erityispiirre” oli julkaistu miehen internetissä olevalla sivustolla. Oikeus piti kyseistä väitettä, tekstin kokonaisuudesta irrotettuna, tyypillisenä ns. vihapuheena. Pelkästään lauseen lukemalla voisi päätellä, että miehen tarkoituksena olisi ollut halventaa ja solvata somalialaisia maahanmuuttajia. Ainoastaan tällä tavalla tarkasteltuna olisi tultava siihen tulokseen, että lausuma täyttäisi kiihottamisen kansanryhmää vastaan tunnusmerkistön. Oikeus totesi kuitenkin, että lausuman perusteluista on todettavissa, että tosiasiallisena tarkoituksena on tämän väitteen osalta ollut arvostella viranomaisten menettelyä siltä osin, kun nämä eivät olleet puuttuneet sanomalehden pääkirjoitukseen, jossa oli arveltu päissään tappamisen olevan suomalaisten kansallinen, ehkä suorastaan geneettinen erityispiirre. Mies oli väitteensä perusteluissa nimenomaan ilmoittanut, ettei tarkoituksena ole yleistää väitettä koskemaan kaikkia somaleita. Hän esitti väitteensä perusteluiksi tilastotietoja ja korosti, ettei käsittele väitettä faktana. Kirjoituksesta ilmenee, että väite on toteutettu satiirin keinoin. Oikeuden johtopäätös oli, ettei miehen tarkoituksena ollut panetella tai solvata somalialaisia vaan mainittu ihmisryhmä on valikoitunut viranomaistoimintaan kohdistaman kritiikin välineeksi lähinnä sattumalta. Oikeus katsoi, että kyseisen väitteen osalta puuttui panettelu- ja solvaustarkoitus ja siksi syyte kiihottamisesta kansanryhmää vastaan hylättiin.

Tuomio ei ole lainvoimainen.

2.13 HELSINGIN HOVIOIKEUDEN TUOMIO 22.9.2009 (Eiilä)

Mies tuomittiin kiihottamisesta kansanryhmää vastaan 60 päiväsakkoon Espoon kärjäoikeudessa 27.3.2008. Kyseessä oleva verkkoviesti määrättiin myös poistettavaksi internetistä yleisön saatavilta ja määrättiin hävitettäväksi. Kyse oli internetissä julkaisusta kirjoituksesta, jossa oli paneteltu ja solvattu maahanmuuttajia ja afrikkalaista alkuperää olevista ihmisistä koostuvaa etnistä tai siihen rinnastettavaa ryhmää. Lausunnoissa oli esitetty muun muassa, että sanottuihin kansanryhmiin kuuluvat ihmiset ovat vaarallisia, koska he ovat luonteeltaan niin väkivaltaisia ja koska he syyllistyvät rikoksiin niin usein. Lisäksi lausunnoissa oli esitetty, että sanottuun ryhmään kuuluvat ihmiset ovat muiden kustannuksilla eläviä loisia ja että heitä on pidettävä kurissa villieläinten lailla. Lausunnot olivat ko. ryhmiä panettelevia ja solvaavia, koska niissä vahvasti yleistäen kuvattiin kokonaiset kansanryhmät alkeellisina, tyhminä, rikollisina ja loisina. Tuomion perusteluissa todetaan muun muassa seuraavaa: "...kirjoitus on oppikirjaomaiseen asiatekstin muotoon puettu ja että kirjoituksessa käsitykset esitetään osin tutkimukseen perustuvina faktoina. Kirjoitus ei siten ole muotonsa ja sisältönsä puolesta sellainen, että sitä ei kukaan voisi ottaa vakavasti. Näin mikäli kirjoitus on sisällöltään syyttäjän väittämin tavoin lain vastainen, kirjoitus on katsottava kysymyksessä olevassa rikoslain kohdassa tarkoitetuksi vakavasti otettavaksi propagandaksi." Perusteluissa todetaan myös mm. seuraavaa: "...Sananvapaudella on oltava laaja sisältö, ja siten esimerkiksi eri ihmisryhmien ominaisuuksista tai maahanmuuttopolitiikasta on demokraattisessa yhteiskunnassa oltava oikeus esittää kärkeviä ja erilaisia käsityksiä. Kuitenkin edellä todettuja X:n laatimassaan kirjoituksessa esittämiä käsityksiä...on pidettävä selkeän panettelevina ja solvaavina, eikä kysymyksessä ole enää hyväksyttävästä sananvapauden puitteissa tapahtuvasta mielipiteen ilmaisusta. X on kirjoituksessaan selkeästi pyrkinyt vain saamaan kirjoituksessaan aikaan lukioissa samanlaisen halveksunnan kyseisiä ihmisryhmiä kohtaan kuin hänellä itsellään on..."

Helsingin hovioikeuden tuomio 22.9.2009, kärjäoikeuden tuomiota ei muuteta.

KKO:sta ei haettu valituslupaa, hovioikeuden tuomio on lainvoimainen.

2.14 HELSINGIN HOVIOIKEUDEN TUOMIO 16.10.2009 (Aakkula)

Helsingin kärjäoikeus jätti miehen rangaistukseen tuomitsematta kiihottamista kansanryhmää koskevassa asiassa maaliskuussa 2009. Mies oli kirjoittanut internetin keskustelupalstalle lausuntoja, joissa paneteltiin ja solvattiin tiettyjä etnisiä ryhmiä. Hän oli mm. todennut, että hän taistelee tiettyä muslimiryhmää vastaan ja että nämä ovat vihollisia. Hän oli solvannut afrikkalaisia esittäen, he tekevät tahtomattaan kaikesta mihin koskevat ruumiskasoja, esittäen tummaihoisilla olevan alhaisemman älykkyysosamäärän, esittäen, ettei tummaihoisia pitäisi pitää osana valtion kansaa vaan heidän tulisi olla kansan palvelijoita. Mies käytti jatkuvasti sanaa "neekeri" ja "ryssä". Lausunnot olivat vahvasti yleistäviä ja erityisesti tummaihoisia solvaavia, uhkaavia ja panettelevia ja lausunnot esittivät heidät tyhminä ja väkivaltaisina.

Kärjäoikeus jätti miehen rangaistukseen tuomitsematta, koska se katsoi, että tekoa on sen haitallisuuteen ja siitä ilmenevään tekijän syyllisyyteen nähden pidettävä kokonaisuutena arvostellen vähäisenä. Mies oli kirjoittanut viestit kahden kuukauden aikana v. 2006. Vastaaja oli kertonut yrittäneensä poistaa viestit keskustelupalstalta, kun hänen tietoonsa oli tullut, että ne oli tulkittu loukkaaviksi. Vastaaja oli myös esittänyt asiassa anteeksipyyntönsä, joka oli hyväksytty.

Helsingin hovioikeus antoi asiassa tuomionsa lokakuussa 2009. Se muutti kärjäoikeuden tuomiota ja tuomitsi miehen kiihottamisesta kansanryhmää vastaan sakkoon, 30 päiväsakkoa á 52 euroa = 1560 euroa. Hovioikeus pohti ratkaisussaan RL 6 luvun 12 §:n 1 kohtaa ja totesi, että rikoksen vähäisyys tulee aina arvostella suhteessa kyseiseen rikoslajiin. On arvioitava, onko rikosta pidettävä rikoslajin normaalitapaukseen verrattuna vähäisenä. Vähäisyysperusteella tapahtuvan tuomitsematta jättämisen on perustuttava kokonaisarviointiin. Yleensä vähäisyysperuste tulee sovellettavaksi, jos tekoa on pidettävä sekä seurausten että syyllisyyden kannalta vähäisenä. Tekohetkellä voimassa olleen RL 11:8 §:ssä rangaistavaksi säädettyä rikosta ei hovioikeuden mukaan voida pitää lajiltaan vähäisenä rikoksena. Hovioikeuden mukaan sitä kärjäoikeuden toteamaa seikkaa, että rikos oli tapahtunut v. 2006, ei voida ajan kulumisen vuoksi tai muutoinkaan pitää rikoksen haitallisuuden tai tekijän syyllisyyden arviointiperusteena. Miehen yritystä poistaa viestejä tai hänen esittämäkseen ilmoittamaa anteeksipyyntöä ei hovioikeuden mukaan voida myöskään pitää mainittuna perusteena.

Valituslupaa KKO:lta ei haettu, tuomio on lainvoimainen.

2.15 HELSINGIN HALLINTO-OIKEUDEN PÄÄTÖS 5.11.2009
(Manne/Romano-TV)

Syrjintälautakunta antoi ratkaisunsa Manne/Romano TV - asiassa 22.9.2008. Kyse oli yhdenvertaisuuslain häirintäpykälän (kielletyn syrjinnän yksi muoto) soveltamisesta palvelujen tarjonnassa. Yhdenvertaisuuslain 6 § 2 momentin 3 -kohdassa määritellään häirintä seuraavalla tavalla: ”henkilön tai ihmisryhmän arvon ja koskemattomuuden tarkoituksellista tai tosiasiallista loukkaamista siten, että luodaan uhkaava, vihamielinen, halventava, nöyryyttävä tai hyökkäävä ilmapiiri (*häirintä*)). Syrjintälautakunta katsoi, että Manne/Romano-TV sarjan esittäminen ei ollut romanien syrjintää heidän etnisen alkuperänsä perusteella.

Helsingin hallinto-oikeus antoi asiassa tuomionsa 5.11.2009. Hallinto-oikeus ei muuttanut syrjintälautakunnan päätöstä.

Ratkaisu ei ole lainvoimainen, vireillä KHO:ssa.

2.16 ROVANIEMEN HOVIOIKEUDEN TUOMIO 2.12.2009 (Kulju)

Kemi-Tornion kärjäoikeus tuomitsi miehen kesäkuussa 2009 kiihottamisesta kansanryhmää vastaan 40 päiväsakkoon á 6 euroa = 240 euroa. Mies oli julkaissut internetin keskustelupalstalla lausumia, joissa hän esitti ja piti hyväksyttävänä, että tiettyihin kansanryhmiin kuuluviin ihmisiin tulisi kohdistaa väkivaltaa ja muita suoria toimenpiteitä heidän poistamiseksi maasta. Hän oli myös verrannut tarkoitettuihin ihmisiin eläimiin. Kirjoituksissaan mies oli selkeästi kehottanut tai ainakin pitänyt hyväksyttävänä väkivallan kohdistamista ulkomaalaistaustaisiin henkilöihin. Lisäksi hän oli käyttänyt kirjoituksissaan panettelevia, solvaavia ja halventavia ilmaisuja. Kirjoituksissaan mies oli mm. todennut, että ”ei muuta kuin kunnolla hakkaamaan niitä eläimiä ja kämppii palasiksi”, pitää kunnolla hakata ne niin häipyis pikku hiljaa” sekä tosi toimiin..hakkaan niitä sarvikuonoja, nouskaa suomi, suomi ei ole sarvikuonojen maa”.

Hovioikeus päätti joulukuussa 2009 olla muuttamatta kärjäoikeuden ratkaisua.

Valituslupaa KKO:lta haettu, tuomio ei ole lainvoimainen.

2.17 KYMENLAAKSON KÄRÄJÄOIKEUDEN TUOMIO 3.6.2010 (Berg)

Mies tuomittiin kiihottamisesta kansanryhmää vastaan 70 päiväsakkoon á 6 euroa, josta vähennettiin vapaudenmenetysaika, suoritettavaksi jäi 64 päiväsakkoa = 384 euroa. Tekohetkellä (2006-2007) oli voimassa RL 11:8 §.

Mies oli markkinoinut internetissä cd-levyä, jolle oli tallennettu ns. White Power -musiikkia ja myynyt ko. tallenteita sekä kotimaassa että ulkomailla. Tallenteiden sanoitukset englannin- ja saksankielisiä. Miehen myymistä tallenteista n. 30-35 sisälsi musiikkikappaleen, joiden sanoituksissa uhataan, panetellaan tai solvataan kansallista, etnistä, rodullista ja uskonnollista ryhmää taikka niihin rinnastettavaa muuta kansanryhmää. Musiikkikappaleiden sanoituksissa kehoitetaan muun ohella ajamaan kaikki vierasmaalaiset ulos Saksasta ja väitetään näiden tuhoavan maan.; väitetään maahanmuuttajien levittävän tartuntatauteja ja kutsutaan ihmisiä rumiksi, haiseviksi ja likaisiksi; toivotaan kristalliyön tapahtumien toistuvan; esitetään juutalaisten, pakolaisten ja tummaihoisten ihmisten tuho toivottavana tapahtumana ja kehoitetaan väkivaltaiseen taisteluun näitä kansanryhmiä sekä seksuaalista vähemmistöä kohtaan.

Oikeus katsoi, että tapauksessa on hyvin selvästi uhattu tappamisella sekä paneteltu ja solvattu mm. juutalaisia. Oikeus pohti hyvin yksityiskohtaisesti, oliko teko tahallinen eli oliko mies tietoinen tallenteiden sanoitusten sisällöstä. Englanninkielisen tallenteen osalta oikeus katsoi, että miehen kielitaito ja suoritettu myyntitoiminta osoitti, että hän on ollut tietoinen tallenteen sisällöstä. Saksankielisten tallenteiden osalta oikeus pohti miehen tietoisuutta mm. levykansien ulkonäön ja sanoitusten perusteella, mies ei osannut saksaa. Levykansissa oli mm. hakaristejä. Mies oli tiennyt joidenkin tuotteiden laittomuudesta Saksassa. Saksankieliset tallenteet sisälsivät mm. sanoja heil ja Skinhead-power, oikeus katsoi, että nämä sanat miehen on täytynyt ymmärtää ja ne ovat osaltaan antaneet hänelle tietoa sanoitusten sisällöstä. Mies oli myös epäillyt toiminnan laillisuutta. Mies soittaa yhtyeessä, joka soittaa White Power -musiikkia.

Oikeus katsoi, että mies on tiennyt kaiken oleellisen englanninkielisen tallenteen osalta ja että hänellä on ollut perusteltu syy olettaa, että myös saksankieliset ovat samanlaatuisia. Rangaistusta mitattaessa on otettu huomioon, että mies on lopettanut myyntitoiminnan omasta aloitteestaan.

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