

Hate Crimes and Freedom of Speech

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Abstract

Aggression is an essential element in human nature. Rather, it is an innate human instinct that plays a prominent role in the struggle for survival, competition for permanence, affirmation of existence, self-protection and control. Because diversity and difference between human beings is a universal law, this difference may lead to the emergence of a kind of intolerance or persecution against certain individuals or groups, and it may even reach the point of hatred, fanaticism and the desire to harm and revenge. And because the protection of human rights and freedoms is the focus of concern for those concerned with humanitarian and legal work, the search for ways to protect these rights from conflicts, hostilities and violations motivated by hate will continue to be sought. Especially since the manifestation of this aggression appear in different forms stemming from hatred, the concept of which varies according to politics and cultures.

Perhaps one of the most important of these problems addressed by our paper is how to strike a balance between the right to protection from the effects of hatred and the right to freedom of expression, especially since the relationship between the two rights is an inverse relationship, the more one expands, the narrower the scope of the other, which requires setting separate boundaries between them to preserve the desired interests achieved by each of them.

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I-Introduction

Most laws have attempted to ensure a balance between the right to freedom of expression and the right of individuals to be protected from the effects of hate speech. In this regard, the Canadian law, for instance, distinguishes between offensive and hateful speech on one hand and the right to freedom of expression on the other. Although the Canadian Supreme Court has declared Section 319 to be constitutional, the 5-4 vote reflects a concern not to overly interfere with freedom of expression.

However, although the Canadian Charter of Rights and Freedoms provides for the enjoyment of the basic freedoms of thought, belief, opinion and expression, it also recognizes that these freedoms are not absolute, but are subject to reasonable limits provided by law.

The question continued to be debated even when the federal government voted to repeal Section 13 of the Canadian Human Rights Act which provides for protection against online hate-mongering. Although the courts had declared Section 13 constitutional, Parliament found the scope of the article to be too broad and hence in violation of due process especially with regard to the principle of legality.

II- The principle of Proportionality and the Constitutional Rights:

Proportionality is defined as “a balancing mechanism between legal principles of equal value, applicable at the same time, but in conflict.”.

Accordingly, if the principle of proportionality is the establishment of a balance between the “weight” of the right and the reasons that prompted the legislator to take a decision to restrict this right in order to achieve legitimate goals. In fact, the law is striving to reconcile rights by giving

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precedence to one right over the other according to the legitimate goals. This perspective is confirmed by the European Convention on Human Rights in its articles 8 to 11, which provide for the possibility of limiting the exercise of the rights it protects when such restriction constitutes “a necessary measure, in a democratic society, to protect certain objectives, including national security, the maintenance of order, the protection of rights and freedoms of others”.

Concerning the hate laws, the views were divided as to maintaining a balance on a number of issues, and the President of the Supreme Court of Canada, Brian Dickson, went to say that the laws of incitement to hatred in the criminal law are constitutional, and his justifications were as follows:

1- The right of expression may be used to spread misconceptions about democratic values, including hate propaganda. The democratic process may be sabotaged and then the individuals will be deprived of respect and dignity just because of their ethnic or religious characteristics. Therefore, this type of expressive activity is hostile to democratic aspirations to ensure freedom of expression.

2. Hate propaganda represents a serious threat to society; It undermines the dignity and self-esteem of the members of the target group, creating a state of conflicting relations between different ethnic, cultural and religious groups. This conflict risk to leads to the erosion of the values and tolerance with which a multicultural society committed to the idea of equality can flourish.

3- Public opinion condemns the use of language or terms when they are racist or homophobic. These terms do not constitute a criminal act in themselves, and therefore one refers to members of societies in the harshest terms without violating the law. However, the language or words can be presented as evidence when determining the motive. In hate crimes, for example a physical assault in a bar during a sporting event is considered as a serious incident. The same if it occurs after homophobic insult, being an indicator of the mental state of the offender. However, regardless of the legal implications, the use of abusive and derogatory language creates a toxic environment.

Perhaps one of the most prominent issues raised in this regard is the case of Saskatchewan (Human Rights Commission) v. Whatcott in 2013, whose facts are that in 2005 prosecutors filed a complaint with the Human Rights Commission in the county of Saskatchewan after receiving pamphlets from Christian anti-homosexual activist Bill Whatcott bearing the phrases “Keep homosexuality out of public schools in Saskatchewan and sodomy in our public schools.” The plaintiffs alleged a violation of Section 14 of the Saskatchewan Human Rights Act (SHRC) which states that “it is prohibited to publish or display any representation that exposes or tends to expose hatred, ridicule, degrading or compromising the dignity of any person or group of members of society.” The Saskatchewan court held that the content of the publication was objectively inconsistent with Section 14 of the Saskatchewan Human Rights Act, and accordingly the court prevented defendant Whatcott from distributing further publications, and awarded compensation to the complainants. The defendant appealed the court's decision, and in 2007 the court upheld the findings of the Saskatchewan Court regarding the violation of Article 14. In 2010 the case was appealed to the Saskatchewan Court of Appeals, and the court held that the judge had erred by looking only at certain phrases from the handouts, and that these posts are not hate post, but the Saskatchewan Commission on Human Rights has sought leave to appeal the decision to the Canadian Supreme Court. The court heard the appeal in 2011 and issued its decision in 2013 to convict Defendant Whatcott.

The court based its decision on the fact that the Canadian human rights hate speech laws constitute a constitutional restriction on freedom of expression, and this is in support of what the Supreme Court decided in 1991, where it ruled that the section on hate speech in the Human Rights Act in Saskatchewan addresses a pressing and fundamental issue and that It fits with its objective of addressing the causes of discriminatory activity to reduce the harmful effects and social costs of such discrimination.

Writing for the majority, Justice Rothstein argued that the law attempts to appropriately balance the core values underlying freedom of expression with charter rights and other core values of a free and democratic society, which necessitate equality, respect for group identity, and the inherent dignity of all human beings.

Three justices from the Supreme Court of Canada provided key guidance that courts should consider when ruling on hate crime cases:

(1) Laws must be applied objectively, though in the case of subjective emotion it is difficult - but not impossible. It is more important to focus on the effects of hate speech than on the intent of the speaker.

(2) Hate must be understood as extreme manifestations of emotion, which are usually described in terms of hate or slander. This leads to excluding expression that does not incite hatred or cause discrimination, if it is offensive.

(3) Courts should focus on the effect of the expression in question, that is, whether or not it is likely to expose the target person or group to the hatred of others. The aversion to the ideas being expressed is not sufficient to justify the restriction of freedom, and whether the author of the expression intended to incite hatred or discriminatory treatment is irrelevant.

Accordingly, it is necessary to determine the potential impact of the expression on the public, taking into account legislative objectives to reduce or eliminate discrimination. That lead to say that "the difficulty of establishing a causal relationship and the seriousness of the harm to vulnerable groups justify the imposition of preventive measures that do not require proof of actual harm."

In another case, *R v Sears and St. Germaine of 2019*, Ontario Court Judge Richard Blouin sentenced James Sears to a year in prison for promoting hatred against Jews and women. In one of his publications, edited and distributed by Your Ward News, he targeted women and Jews by hate speech. The newspaper was first distributed to 300,000 families via e-mail, then used the Internet as a method of publication, with a readership exceeding one million. This was the first time in Canada that women were identified as a target group in a conviction under Provisions of hate crimes in criminal law.

In this precedent, the court decided that it was necessary to search whether the content of the news had reached the level of hatred or not, and if so, whether the defendants promoted that hatred or not. The sentence imposed on the perpetrators of this incident was the maximum allowed by law, and Judge Blouin indicated that he would have preferred a longer prison sentence, as defendant Sears promoted hate to a wide audience in an era where exposure to such material online is relentlessly radicalizing and the potential for mass damage is increasing.

III-Determining the Scope of Constitutional Protection for Freedom of Opinion and Expression:

The American judiciary tended to reconcile the basis for criminalizing hate images with the right to freedom of opinion and expression. The position of the Supreme Court was evident in the case of *Chaplinsky v. New Hampshire*. The accused directed his speech to military commander with phrases such as, "You are blackmailing others, you are a damned fascist." The Supreme Court refused to extend the constitutional protection to these statements, considering that the quarrelsome statements do not express an opinion and do not achieve the interest of society in order to benefit from the constitutional protection of the right to freedom of opinion. These statements - in the opinion of the court - are likely to generate acts of violence that cannot be controlled.

However, the Supreme Court reversed its earlier opinion in *Terminiello v. Chicago* to decide that not all expressions that carry provocation and attack are outside the scope of constitutional protection in freedom of expression. It tended to say that general statements that are not directed at a specific person enjoy constitutional protection, but when it comes to insulting or slanderous expressions, they do not enjoy that protection.

The scope of freedom of expression was limited by the US Supreme Court in *Cohen, Appellant, v. State of California*, in which the appellant was charged under §415 of the California Penal Code, when he wore a T-shirt with obscene language attacking the Vietnam War bill. The state courts ruled to punish him in accordance with the previous article, which punishes those who carry out acts including wearing clothes that would cause a disturbance of security or tranquility in certain places or certain people, as that would prompt others to try to attack the accused in order to remove this shirt from him, causing hereby public security disturbance. The accused appealed before the Supreme Court invoking his right to freedom of opinion and expression, and the Supreme Court ruled that his act does not directly cause public security disturbances, and therefore his act does not constitute direct incitement to commit crimes. Accordingly, what he has done falls

within the scope of his right to expression, in accordance with the previous criteria adopted by the court in determining the scope of freedom of expression.

It is to be noted that the US Supreme Court upholds the constitutionality of laws that place restrictions on this type of expression, every time the expression of opinion involves insult or slander or was likely to result in a disturbance of public security, as it ruled in the case of *Beauharnais v. Illinois* in which the defendant distributed leaflets against American blacks as violent and rape perpetrators, and called on residents to rally to stand up to them and expel them from Chicago.

The question arises, in the case where general statements or ambiguity are marred by what constitutes an interference related to the right to freedom of opinion and expression?

We find that in all cases, if the expressions are so general and vague as to interfere with the right of expression, then the US Supreme Court decides the unconstitutionality of the law that punishes them. That was the opinion of the court - in the case of *Alabama v. Thornhill* - when it overturned the guilty verdict of the picket charge, when this judgment was based on Alabama law punishing picketing in workplaces with intent to disrupt this act, as the court assessed that the law violates the right to freedom of opinion and expression protected by the constitution.

The example is also given by the law of the state of Colombia (Article 1115-22) criminalizing the act of gathering in the vicinity of the embassy of a foreign country for closer than 500 feet or raising banners demeaning the country that owns the foreign embassy. Following a conviction of this charge, the accused appealed to the US Supreme Court on the ground that the First Amendment to the Constitution that guarantees the right to expression was violated. The court ruled that this law infringed the right to freedom of opinion and expression.

The court's commented at the time that the aforementioned law was not well drafted so as not to interfere with the right to freedom of opinion and expression. In order to reach that end, the legislator had to include in the law conditions for criminalization; that there must be a necessary social interest in protecting foreign embassies that outweighs the right to freedom of opinion and expression. This will not be achieved - from the point of view of the court - unless this law requires that the accused obstruct the work of the embassy staff by preventing them from entering the premises of that embassy or that the perpetrators intimidate or assault them.

However, the Supreme Court-in *Broadrick v. Oklahoma* - did not find the flaw of generality and ambiguity in the provision of law in the US state of Oklahoma that prohibits public officials from engaging in political activity. The court ruled that this text did not contradict freedom of expression because it addressed an activity and did not address the expression of an opinion.

In the case of *State v. Plowman* When the accused and two of his colleagues assaulted and severely beat two Hispanics, they were brought to trial based on ORS 166.165(1)(a)(A), which criminalized battery and assault of two persons or more, and this was because they were aware that the victim belonged to a certain origin, colour, region, nationality or sexual orientation. The defendants challenged the unconstitutionality of that article on the basis of which they were brought to trial, and based their appeal on the unconstitutionality of the previous article and its violation of the First Amendment of the American Constitution, which guarantees freedom of expression.

With this regard, the American courts, when they consider that a text is tainted by the flaw of generality and ambiguity, they conclude to the violation of the Fourteenth Amendment to the American Constitution, which provides for the right of the accused to a fair trial. That trial is not fair if it is based on a general and ambiguous text in the statement of the elements of the crime or the penalty prescribed for the act, because that may open the door to arbitrariness of judges in the interpretation and the application of the text.

Therefore, the appellants based their appeal on the unconstitutionality of this law on the ground that the accusing authority must show the relationship between ethnic or religious origin and the assault, and that without that difference, the assault would not have taken place. The previous article states that the criminalization or the aggravation of the penalty occurred "because of" ethnic or religious origin or...which cannot be proven. In addition, the criminalization addresses the aggressor of different ethnic or religious origin or... from the victim, while the assault can take place when this ethnic or religious origin is present without being motivated by the difference. In addition to this, the text requires that the assault occurs because the accused believes that the

victim was of a different origin, religion, or. This belief is something that a person cannot be held accountable for in form of criminalization or aggravation of penalty.

However, the US Supreme Court rejected this appeal and ruled that the text is clear in meaning so that the addressee knows the punishable behavior or the reason for aggravating the penalty in order to refrain from it, and that the accusing authority must show from the facts what convinces the court that the accused chose the victims because of their origin or race (being of Spanish origin, South American) from the facts and circumstances of the case.

The court also ruled out that the text did not violate freedom of expression, as this behavior did not involve any form of expression protected by the constitution. The court emphasized the clarity in the conditions of criminalization as follows: - The act was committed by two or more people, - The perpetrator must have committed a physical assault, - The assault was intentional or based on the recklessness of the perpetrators, - The assault occurred because of the origin or believing that the victim belongs to a particular origin.

The same issue was raised before the English courts concerning the limits of the right to free opinion and expression as indicated in the European Convention of Human Rights - which became part of the English internal law. The case was about people who sent pictures of aborted fetuses to some pharmacies that used to sell aborted substances. Those people considered the abortion a kind of murder because they were fighting laws that allow abortion. The court ruled that they had committed the crime of disturbing others by means of communication in bad faith with the intention of doing so and causing a state of depression or tension. (Communications Act 1988, s 1(1)(b) and (4))

The English Court of Appeal upheld the guilty verdict on the grounds that the accused went beyond the limits of his right to express his religious beliefs in accordance with Article (9) of the European Convention, and so exceeded the limits of his right to expression in accordance with Article (10) of the same convention. It was obvious that the accused did not content himself with expressing his view regarding the legalization or criminalization of abortion, and that was not necessary in a democratic society to choose two pharmacy owners to send them pictures that would intentionally cause them depression and tension.

The English courts also rejected the arguments of the accused who invoked the freedom of expression when he put on the window of his home a drawing of the two burning trade towers and wrote on it "Muslims should leave our country" and was convicted according to English law. The accused appealed before the European Court of Human Rights on the basis that the matter was not related to any form of violent acts, and that his behavior was nothing more than words and not actions, and that it fell within the freedom of expression. The European Court of Human Rights ruled that what the accused had done violated Article 17 of the Convention because it is a violation of the rights of others.

IV-Opinion of the European Court of Human Rights:

The position of the European Court was emphasized when the Court ruled – in the case of Pavel Ivanov v. Russia - that freedom of expression did not protect the defendant, who, in his writings against the Jews, was describing them as the origin and source of evil in Russia; Because these writings involved a racist attack on a group of people. As previously said, the court ruled - in the case of Norwood v UK that freedom of expression clause does not protect those who posted on the window of his house a picture of the burning World Trade Tower and next to it the title "Let Islam out of Britain, let's protect our country"; This is because what he has done constitutes an attack on the values protected by the Convention.

V-Criterion of clear and immediate danger and the right to freedom of expression:

In its evolution to allow the criminalization of hate speech, the US Supreme Court has adopted the "clear and present" test, meaning that the danger is imminent and foretells the occurrence of a crime.

In this context, the European Court of Human Rights addressed the question of the inconsistency between the right to free expression and the protection of society from hatred in the *BALSYTĖ-LIDEIKIENĖ v. LITHUANIA* in which the defendant was accused of publishing an

article in which he attacked the Jews and considered them responsible for the genocide of the people of his country. The publisher was brought to trial and was convicted of an administrative penalty, given that this crime is punishable by an administrative penalty and not by a criminal one. That punishment was a warning and confiscation of books that contained those phrases that incited to hatred. He appealed against the sentence before the European Court of Human Rights on the basis of a violation of the provision of Article (9), which guarantees a just lawsuit, and Article (10) which guarantees the right of expression.

The European Court of Human Rights held that the published statements constituted incitement to hatred and that this act would prevent social peace between people. It also concluded that administrative criminalization, if it is provided for an act of a criminal nature, and even if it is not punishable with a criminal penalty, must be protected in punishment and trial by the guarantees of a fair lawsuit established by Article (6) of the Convention. In fact, the prescribed penalty, which is the confiscation of publications, is similar to the criminal confiscation, and that would confirm the criminal nature of this administrative criminalization as well as the necessity of providing the elements of a fair trial for the accused of this act.

However, the court ruled that hate -crime laws constituted a restriction on the freedom of expression. This limitation is justified in a democratic to defend public order from the disturbance caused by incitement to hatred. Accordingly, the court dismissed the case.

Concerning the aggravating circumstances provided for in hate-crime laws, the Supreme Court permitted -in Wisconsin v. Mitchell- this kind of increase of punishment. In this case, a group of young African Americans agree to assault a white youth. The court decided to impose a four-year prison sentence, with an increase in the original penalty for the crime, which is two years, because the assault was motivated by revenge against the young man because of the color of his skin.

In the same vein, the European Court of Human Rights ruled - in the case of Pavel -IVANOV v. Russia - that the appellant's publication of words containing incitement to racial hatred against Jews by publishing in a newspaper that Jews were the root of the evils that have occurred to humanity was not protected by Article 10 of the European Convention on Human Rights, which guaranteed the freedom of expression. This freedom, in the opinion of the Court, is not absolute and is consequently restricted when it encroaches on the rights guaranteed by the Convention.

In this respect, in Virginia, a special law was issued to resolve the controversy regarding burning crosses by criminalizing the burning of cross if the purpose was to intimidate a person or a group of people because of their religion. The Supreme Court of the United States of America- in Miller v. California- ruled that the law contravened the right of expression provided for by the American Constitution in its Fourth Amendment. It was obvious for the court that the intent to intimidate is an internal matter and that the nature of the activity carries an expression of opinion, regardless of the degree of agreement with it. Nevertheless, it was held in the view of the court- in this case - that what the accused had done was a punishable act. So, punishing this defendant does not contradict the constitution.

VI-Conclusion

Hate crimes are crimes of a special nature, because they comprise an underlying danger emanating from the feelings of the perpetrators and affect not only the individual, but the entire community of the victim. This contributes to the disintegration of society, the undermining of democratic values, and inequality. Perpetrators of these crimes aim to spread the unequivocal message that entire groups of citizens are disrespectful, inhuman and deserving of contempt, propagating his idea that "being different is dangerous."

And because the protection of human rights and freedoms is the focus of the interest of those concerned with humanitarian and legal work, it is legitimate to search for ways to protect those rights from conflicts, hostilities and violations committed with hate motives, whether against specific individuals or communities. In this regard, the laws prohibiting deeds and words motivated by hate are constitutional at the same time they are encouraged with a view to protect the vulnerable persons and categories of people.

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