HATE SPEECH IN A FREE AND DEMOCRATIC SOCIETY

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The issue of hate speech in a liberal democracy involves the balancing of two fundamental human rights, those of expressive freedom and freedom from incitement to hatred and discrimination. The US and its case law are outliers in this regard. Canadian constitutional jurisprudence has established that there is no hierarchy of human or constitutional rights. The Supreme Court has ruled that it is constitutionally permissible to regulate hate speech.

La question du discours haineux dans une démocratie libérale implique l'équilibre entre deux droits de la personne fondamentaux, ceux de la liberté d'expression et de l'absence d'incitation à la haine et à la discrimination. La jurisprudence des États-Unis présente des cas aberrants à cet égard. La jurisprudence constitutionnelle canadienne a établi qu'il n'y a pas de hiérarchie des droits de la personne ou constitutionnels. La Cour suprême a statué qu'il est constitutionnellement permis de réglementer le discours de haine.

ONE RIGHT OR TWO?

The issue of hate speech in a liberal democracy involves the balancing of two fundamental human rights, those of expressive freedom and freedom from incitement to hatred and discrimination. The need to balance these two rights reflects a fundamental tension in all liberal democratic societies between the foundational values of "liberty" and of "equality," corresponding, on the one hand, to the right to be left alone by the state and, on the other, to the right to the assistance and protection of the state from unjust discrimination.

That there are indeed two rights at issue when society confronts hate speech such that freedom from incitement to hatred and discrimination is as much a human right as expressive freedom, becomes clear when one looks carefully at the list of human rights in the foundational document for the modern concept of human rights, the *Universal Declaration of Human Rights* ("UDHR").

Article 19 provides:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."

At the same time, article 7 provides:

> "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination and violation of this Declaration and against any

incitement to such discrimination."

That conventional international law regards incitement to hatred as a form of incitement to discrimination from which groups and individuals are entitled to protection is clear from article 20 of the *International Covenant on Civil and Political Rights* ("ICCPR"), to which Canada is a signatory. Article 20.2 provides:

> "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

A "PURPOSIVE" APPROACH

In the US jurisprudential tradition "free speech," protected by the First Amendment to the US Constitution, occupies a special place under a doctrine often referred to as the "First-ness of the First Amendment." Under this doctrine, expressive freedom enjoys a constitutional primacy and near absolute protection. However, the US and its case law are outliers in this regard. Canadian constitutional jurisprudence has established that there is no hierarchy of human or constitutional rights, with each case to be decided on its own facts within a "purposive" interpretive context.

Once again the UDHR is instructive. As it makes clear, human rights are not abstract or reified, but rather contextual in character. When we think of human rights, we should be asking not "what is the definition of this human right?" but rather "what is the purpose of this human right?" That is what is meant by a "purposive" approach. It is the approach taken by the drafters of Article 19 of the UDHR, outlining the right to freedom of opinion and expression when that Article invokes the right to "seek, receive and impart information and ideas." It is also the approach underlying the phrasing of Article 7, which refers to the "equal protection of the law against any incitement to … discrimination."

We can also understand that it is for this reason that Article 30 provides:

> "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

An abstract invocation of a human right cannot be used as an excuse to justify undermining another human right. Analysis begins by looking at the purpose of each right in question and then determining how on the facts those purposes are advanced or impeded.

The preamble to the UDHR provides a clear statement of the ultimate basis and purpose for the protection of human rights. As such it provides a functional and "purposive" context for the list of human rights that follow.

> "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…"

In other words, the foundation for human rights is the recognition of the inherent dignity and the inherent equal and inalienable rights of all members of the human family. The human rights, which the preamble goes on to enumerate as including "freedom of speech and belief and freedom from fear…", are thus based on, and intended to reinforce, the equality and the inherent worth and dignity of all individuals.

While not determinative of any given situation involving an allegation of hate speech, it is nevertheless obviously significant that true hate speech is itself both an infringement of another human right and a denial of the fundamental principle that underlies all human rights and that is the purpose for their existence.

APPLYING A PURPOSIVE APPROACH TO THE REGULATION OF HATE SPEECH

A purposive approach to the regulation of hate speech begins with the obvious observation that hate speech denies the fundamental premise that underlies all human rights, that of the equal worth and dignity of all human beings, and is inconsistent with the human right to be free from incitement to hatred and discrimination.

But before one moves on to the next stage of exploring the implications of that observation, it is important to confirm whether what one is dealing with is, in fact, truly "hate speech" and that, in turn, raises the issue of who decides that question.

A NEUTRAL ARBITER

The Supreme Court of Canada has ruled that it is constitutionally permissible to regulate hate speech and indeed the ICCPR seems to suggest that it is incumbent upon states to do so. The problem is that governments are not ideal regulators, and there will always be at least an appearance of conflict of interest and/or a danger that the regulation will be a disguised means to suppress unpopular political opinions. It is therefore important that the power to adjudicate be put in the hands

of an impartial, independent and well-qualified adjudicator.

There is no perfect body to fill this role, but in advanced western democracies, the judiciary is best placed to take on this role. Administrative tribunals are not a good choice. Few have the qualifications to do so. Most are short-term political appointments and therefore not truly independent. Many are not amenable to judicial review. In the Canadian context, the courts have proven to be independent, are subject to appellate review and have benefitted from a clear jurisprudential standard for what constitutes "hate speech" that protects the right to be free from incitement to hatred while respecting the right to expressive freedom even for offensive, scurrilous and unpopular speech.

THE STANDARD

If we have an adjudicator, what is the standard? What is "hate" for purposes of "hate speech"?

A proper standard for what constitutes "hate speech" captures the purpose of the human right of freedom from discrimination and incitement to hatred and discrimination.

It does not capture speech that is merely unpopular, impolite, rude, offensive, blasphemous, immoral or even untrue. So long as they do not constitute incitement to hatred or discriminate against an identifiable group, all of the latter types of speech are examples of expression that would be protected under a purposive approach to expansive freedom whether as set out in international statements of principle like the UDHR or constitutional instruments like the Charter. They are not examples of "hate" for constitutional purposes.

The international documents all speak of incitement to hatred or discrimination. This is a very important first point to notice. The speech being referred to is speech meant to provoke an emotional reaction, not speech meant to convey ideas or facts. As for the emotion intended to be produced, Canadian courts have referred to it as a heightened and ardent emotion, synonymous with "detestation." It has been described as "demonizing" and "dehumanizing" an entire group. It can therefore be contrasted with criticism, offensive speech, inappropriate language, "micro-aggression", insensitivity, etc.

"Hate speech" therefore is a very specific category of speech that is aimed at producing an emotion of detestation against a specified group, whose human worth and dignity it either explicitly or implicitly denies.

Where so found by an impartial and independent adjudicator, it is not improper to regulate or proscribe such speech.

SHOULD HATE SPEECH BE PROSCRIBED?

Canada, like many liberal democracies has a number of criminal and administrative provisions meant to deal with hate speech. Some critics maintain that these are inappropriate in principle as attacks on the human right of expressive freedom. It is hoped that the foregoing discussion has demonstrated that such criticism is fundamentally misguided and misconceived.

But there is a difference between "may" and "should."

Even if it is legally or constitutionally permissible to regulate or proscribe hate speech, is it a good idea to do so? Some critics believe hate speech provisions to be ineffective or even counter-productive. It is said that they are ineffective because of the difficulty in distinguishing between hate speech and offensive speech and because new technologies make it impossible to pursue even real hate speech. It is said that hate speech provisions are counter-productive in that they provide a platform and publicity for hate mongers who would otherwise attract little attention.

The argument about definitional difficulty is the same as can be made about any legislation that seeks to set a boundary along a continuum. The definition proposed by the Supreme Court of Canada sets the standard sufficiently high to mitigate such concerns.

The fact that some speech will escape regulation due to new technologies that do not respect national borders is not a reason to abandon all attempts at any regulation.[1] The fact that some attempts at regulation may be counter-productive and may play into the hands of demagogues who exploit the attendant publicity is a reason to exercise prudence and discretion at the front end, not to throw up one's hands.

In fact, as has often been pointed out, the enemies of an open society are in a no-loss position regardless of how their

1 A more serious issue beyond the scope of this brief paper, is the impact of new technologies on the very notion of "facts" and "truth", which is especially germane to our topic as it relates to the frequently repeated chestnut "the best response is bad speech is more speech." The current fragmentation of audiences, proliferation of "alternative facts," state sponsored hoax news, conspiracy theories, blurring of the border between "facts" and "opinions," and increasing technological ability to manipulate images to revise history has created a genuine question as to whether and for how long it will be possible to maintain a social consensus about objective facts. It has always been questionable whether the analogy to Nineteenth Century economics involved in the metaphor of a "marketplace of ideas" was an especially convincing one. In the Brave New Putin/Trump Tech World of the Twenty-First Century, the metaphor makes no sense whatsoever.

incitement to hatred is treated. Either they are allowed to undermine the right to be free from incitement to hatred and discrimination and thereby compromise the human rights of others or they are able to garner free publicity for their hateful messages. This is not an issue that can be dealt with by means of formulaic responses. One size definitely does not fit all. Each situation should be addressed on its own specific facts.

In the final analysis, the fact that there are tools available to be used when appropriate is an important fact in and of itself. The fact that prosecutorial or regulatory authorities may choose to initiate proceedings provides an important means by which it is possible to signal condemnation of hatred directed against the most vulnerable in society and to reaffirm solidarity and recognition of the inherent dignity and equal worth of all members of society. Whatever other results may ensue, that alone is an important vindication of human rights.