FREE SPEECH ON CAMPUS: LESSONS FROM INTERNATIONAL AND COMPARATIVE LAW

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Is free speech in the university context any different from free speech in general? The notion of academic freedom underlies the university's special social role as a source of sometimes radical, provocative, and unpopular thought. Society recognizes that the intellectual ferment provided by unrestrained campus debate is an essential contribution to its philosophical and scientific well-being. Little wonder, then, that scoundrels of a variety of ideological hues seek both credibility and protection in the shroud of gown and mortarboard. For example, anti-Semitic propagandists spouting the lies of Holocaust denial thrive on the label "revisionist", as this suggests their drivel has some legitimate place within historical scholarship.

The "marketplace of ideas" is a familiar metaphor. According to its proponents, truth will win out over falsehood in this fabled marketplace just as surely as the world will beat a path to the door of the inventor of a better mousetrap. What a terribly naïve conception, both of ideological debate and of the extermination industry! In a modern-day commercial context, our mousetrap inventor needs legislation designed to frustrate unfair competition. Pursuing the analogy, the "marketplace of ideas" must be regulated so as to prevent the sale of the ideological equivalents of crack cocaine, child pornography and thalidomide. The problem with free speech on campus is not whether or not it should be absolute, but simply where the line should be drawn and by whom.

In Canada, we have a few laws to deal with hate propaganda, although their reach is rather feeble. It is true, s. 319 of the *Criminal Code*[1] allows prosecution for public incitement of hatred. It was enacted following the Cohen Commission recommendations back in the 1960s to give effect to obligations Canada had assumed under the *International Convention on the Elimination of All Forms of Racial Discrimination*.[2] However, the hate propaganda provisions of the *Code* are a blunt instrument. They allow defendants a series of special defences and furthermore require the prosecution to meet a criminal burden of proof. It is not surprising, then, that the Crown is less than enthusiastic about undertaking such cases. Its refusal to prosecute Ernst Zundel drove frustrated Holocaust victims to

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[1]R.S.C. 1985, c. C-46 [hereinafter *Code*].

[2]7 March 1966, Can. T.S. 1970 No. 28, 660 U.N.T.S. 195 [hereinafter *Racial Discrimination Convention*].

the only other applicable *Code* provision, and this led to a Supreme Court victory for the hate-mongers.[3]

It is better to take the regulatory route, where the objective of repressing expressions of discrimination can be attained with greater certainty. With appropriate human rights legislation, including language codes and other similar instruments, we can effectively control not only hate propaganda, but also its less violent cousins, language that insults and harasses those groups that are traditionally victims of discrimination. Universities should show social leadership in enacting appropriate regulations to prevent the abusive use of their prestigious platforms. Great flexibility and tolerance is required in this difficult task, so as to eliminate the hazardous products in this marketplace of ideas without stifling genuine debate.

With regard to what is acceptable or unacceptable there will be constant and inevitable dispute. Personally, I am a great fan of *Othello* and *The Merchant of Venice*, although I know there are many who fear the harm these misunderstood works may cause. They should see Paul Robeson as Othello and Dustin Hoffman as Shylock to appreciate that it is not the work itself that is offensive, and that in the hands of sensitive actors these plays can become eloquent and persuasive pleas for tolerance.

In our approach to questions of free speech we have long dwelt in the shadow of American jurisprudence. The U.S. courts have elevated the *First Amendment* of the *Constitution* to a status just short of the absolute. An example of this extreme view can be seen in the recent case of *Doe* v. *University of Michigan*.[4] The U.S. District Court struck down a university policy on discrimination and discriminatory harassment of students, ruling that it was unconstitutionally vague and overbroad. More recently, Justice Antonin Scalia of the Supreme Court has affirmed the same philosophy in a case dealing with a municipal by-law concerning hate propaganda.[5]

We do not share the American attachment to handguns and the gas chamber; we should not share this far-reaching view of free speech either. A better model is provided by international human rights instruments, which have recognized the need to limit freedom of expression and, in some cases, to repress its more obnoxious aberrations. The *International Covenant on Civil and Political Rights* enshrines the right to freedom of expression, but subjects it to "special duties and responsibilities". It specifies that such a right may be restricted by legal norms

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[3] *R.* v. *Zundel*, [1992] 2 S.C.R. 731.

[4] 721 F. Supp. 852 (E.D. Mich. 1989).

[5] *R.A.V.* v. *St. Paul*, 112 S.Ct. 2538, 120 L.Ed. 2d 305 (1992).

that are necessary "for respect of the rights or reputations of others".[6] Furthermore, it declares:

> Article 20
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> (1) Any propaganda for war shall be prohibited by law.
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> (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The *Covenant* has been ratified by nearly 130 states, including of course Canada.

Another important treaty, the *International Convention on the Elimination of All Forms of Racial Discrimination*, proclaims:

> Article 4
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> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the *Universal Declaration of Human Rights* and the rights expressly set forth in article 5 of this Convention, inter alia:
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> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
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> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
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> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.[7]

To this treaty, Canada is also a party, along with nearly 150 other states. Let no one suggest, then, that attempts to limit abuses of free speech are a recent creation of the "politically correct". These widely ratified human rights treaties

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[6] 16 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171, art. 19 [hereinafter *Covenant*].

[7] *Supra* note 2.

were adopted by the General Assembly of the United Nations. Internationally, they constitute a consensus, although a few States – notably the United States of America – refuse to go along.

The *Canadian Charter of Rights and Freedoms* is somewhat less explicit than the international instruments on the matter of limits on free speech.[8] However, in *Keegstra* v. *Canada*[9], Dickson C.J. of the Supreme Court of Canada, writing for the majority, actually cited article 20 of the *Covenant*[10] and article 4 of the *Racial Discrimination Convention*[11] in order to flesh out the kinds of limits on free speech that are appropriate in a free and democratic society, as intended by s. 1 of the *Charter*.

Furthermore, in *Keegstra* the majority of the Court dismissed the suggestion that Canada should endorse the view of free speech adopted by the U.S. Supreme Court, pursuant to the *First Amendment*. Chief Justice Dickson made particular reference to the presence of a limitation clause (s. 1), which finds no equivalent in the U.S. *Bill of Rights*. After analyzing the American jurisprudence, Chief Justice Dickson stated:

> Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States.[12]

In *Keegstra*, Chief Justice Dickson spoke of fashioning a "uniquely Canadian view of a free and democratic society".[13] Yet in reality, the view that free speech is subject to important limitations is shared by many of the world's most progressive states, and finds itself manifested in a whole series of international human rights instruments. On this point, Chief Justice Dickson noted:

> In my view the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression.[14]

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[8]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11 [hereinafter *Charter*].

[9][1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1, [1991] 2 W.W.R. (2d) 193 [hereinafter *Keegstra* cited to S.C.R.].

[10]*Supra* note 6.

[11]*Supra* note 2.

[12]*Supra* note 9 at 740.

[13]*Ibid.* at 743.

[14]*Ibid.*

The *Keegstra* case underscores the role of international law in *Charter* interpretation.[15] The Supreme Court found the case-law of the European Commission and Court of Human Rights to be particularly helpful in this respect.[16] In one of its reports, the European Commission of Human Rights applied article 10 of the *European Convention for the Protection of Human Rights*,[17] which subjects free speech to limits that are necessary in a democratic society:

> By describing the historical fact of the assassination of millions of Jews, a fact which was even admitted by the applicant himself, as a lie and a Zionistic swindle, the pamphlets in question not only gave a distorted picture of the relevant historical facts but also contained an attack on the reputation of all those who were described as liars or swindlers, or at least as persons profiting from or interested in such lies or swindles. The Commission considers that the courts rightly identified this as the underlying tendency of the pamphlets in question. Their restriction was therefore not only covered by a legitimate purpose recognised by the *Convention* (namely the protection of the reputation of others), but could also be considered as necessary in a democratic society. Such a society rests on the principles of tolerance and broadmindedness which the pamphlets in question clearly failed to observe. The protection of these principles may be especially indicated vis-à-vis groups which have historically suffered from discrimination.[18]

These comments have focussed on hate propaganda and one of its particularly odious manifestations, "Holocaust denial". The principles go further, however, and encompass expression aimed at harassing or humiliating members of groups traditionally subject to discrimination. Opponents of this principled and internationalist approach to freedom of expression will allege that it annihilates academic freedom. Such a suggestion ignores the context of the debate, which is more properly the protection of freedom of expression.

Does academic freedom go further than the constitutional guarantee of freedom of expression? If it does, should it? The Canadian *Charter*'s reach into

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[15]The principles are set out in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 348, Dickson C.J., 51 Alta L.R. (2d) 97, [1987] 3 W.W.R. 577, 28 C.R.R. 305, 38 D.L.R. (4th) 161, 74 N.R. 99, 78 A.R. 1. See also W. A. Schabas, *International Human Rights and the Canadian Charter*, (Toronto: Carswell, 1991).

[16]According to Dickson C.J. in *Keegstra, supra* note 9 at 754, "Decisions under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* are also of aid in illustrating the tenor of the international community's approach to hate propaganda and free expression". A number of cases addressing article 10 of the *European Human Rights Convention* are considered in the majority judgment in *Keegstra*.

[17]*European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur. T.S. 5, 213 U.N.T.S. 221 [hereinafter *European Human Rights Convention*].

[18]*X.* v. *Federal Republic of Germany* (No. 9235/81) (1982), 29 Eur. Comm. H.R. D.R. 194 at 198. See also *Kühnen* v. *Federal Republic of Germany* (No. 12194/88) (1988), 56 Eur. Comm. H.R. D.R. 205.

the universities is rather modest,[19] although provincial human rights codes go much further.[20] The Québec *Charter of Human Rights and Freedoms*[21] prohibits dismissal or other form of sanction based on political belief or opinion, and similar provisions exist in other provincial human rights codes. Québec's *Charter of Human Rights and Freedoms* enables litigants to assert claims to free speech within the university context, and opens the door to such enticing remedies as injunctive relief and exemplary damages.[22] Academic freedom as a concept may well have had more significance some decades ago, when human rights protections were absent.

In this context, it is interesting to note that South Africa's provisional Constitution, which came into force in January, 1994, specifically protects academic freedom as part of its guarantee of freedom of religion, belief and opinion:

> 14.(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, *which shall include academic freedom in institutions of higher learning.*[23]

Of course, nothing comparable to this explicit mention of academic freedom exists in the *Charter* or the provincial charters and codes. Indeed, a Canadian jurist would probably be more prone to place the matter within freedom of expression (s. 2(b) of the *Charter*) rather than within freedom of religion (s. 2(a)). The distinction is not without significance, at least in the South African context. The new Constitution of South Africa entrenches freedom of religion more securely than freedom of expression: not only must limits on freedom of religion be both reasonable and necessary (limits to freedom of expression need only be reasonable),[24] freedom of religion can never be suspended, even in a state of emergency.[25] But it is important to note that the South African provisional Constitution, like the Canadian *Charter*, is based on international models which balance freedom of expression with the rights of groups to be protected against hate speech and discriminatory language. Who could have any doubt that for the drafters of South Africa's Constitution, hate speech and its corollaries constitute limits on academic freedom?

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[19] *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229, 2 C.R.R. (2d) 1.

[20] *University of British Columbia* v. *Berg*, [1993] 2 S.C.R. 353.

[21] S.Q. 1975, c. 6.

[22] R.S.Q., c. C-12, s. 49.

[23] *Constitution of the Republic of South Africa, 1993, Government Gazette*, Vol. 343, No. 15466, 28 January, 1994 [hereinafter Constitution of South Africa] [emphasis added].

[24] *Ibid.* at s. 33(1)(aa).

[25] *Ibid.* at s. 34(5)(c).

The South African courts seem to be quite enamoured with Canadian case law, because of similarities between the new Constitution of South Africa and the provisions of the Canadian *Charter*. It would not be unreasonable to expect eventually for there to be some reciprocation, with Canadian courts looking to the South African courts as an additional source of comparative law. Would the reference to academic freedom in the South African instrument have any impact on Canadian constitutional interpretation? It is quite thrilling to speculate on the possibility that Canada's Supreme Court consult judgments of the new South African Constitutional Court, many of whose recently-appointed members are comrades of Nelson Mandela in the anti-apartheid struggle. Their insights into the scope of fundamental rights and freedoms will be welcomed.

Free speech must be protected everywhere. The *Charter* makes no distinctions in this respect, and rightly so. But its importance is felt most acutely in the university, which has always been a forum for unpopular views and more or less constant, dynamic debate. The South African provisional Constitution, and the case-law developed by that country's Constitutional Court, may help to focus attention on the unique importance of the university within the context of the protection of free speech. But universities should not shy away from regulating access to the "marketplace of ideas". The duty of universities to protect the dignity of groups traditionally subject to discrimination is perhaps felt more sharply today because many of the historically excluded are now members of the university community as faculty and students. In their case, the prohibition of hate speech is a right.